89- 1543

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANKLIN LEE FISHER,
Petitioner,

Versus

IDA MARIE CUTLER LYONS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHELPS DUNBAR MARKS
CLAVERIE & SIMS
HARRY A. ROSENBERG*
M. NAN ALESSANDRA
Thirtieth Floor, Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130-3245
Telephone: (504) 566-1311

Attorneys for Petitioner,
Franklin Lee Fisher

**Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

(1) If a plaintiff moves for summary judgment on remand, does law of the case compel a trial court to grant the motion solely in reliance on the appellate court's findings if the defendant presents new evidence on remand which evinces a factual dispute?

(2) Are factual determinations made by an appellate court binding on a district court as law of the case if new evidence is provided on remand which undermines the factual assumptions made by the appellate court on the first appeal?

(3) Is a movant for summary judgment obligated to address and provide evidence supporting each issue involved in a case when moving for summary judgment even if such issues are not germane to a summary disposition?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

(1) Ida Marie Cutler Lyons

(2) The Ida Marie Lyons Class Trust

(3) Catherine Cutler Hurst

(4) The Catherine Hurst Trust

(5) Hazel Pauline Cutler Sawyer

(6) The Hazel Sawyer Class Trust

(7) The BKH Trust

(8) The BKL Trust

(9) The CML Trust

(10) The GSM Trust

(11) The JBS Trust

(12) The JWH Trust

(13) The RCH Trust

(14) The RCL Trust

(15) The RLC Trust

(16) The SAS Trust

(17) The SEG Trust

(18) The SMS Trust

(19) Franklin Lee Fisher

(20) Hunt Oil Company

(21) Carmouche, Gray & Hoffman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANKLIN LEE FISHER,
Petitioner,

Versus

IDA MARIE CUTLER LYONS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit post remand is reported at 888 F.2d 1071 (5th Cir. 1989), and is reprinted in the appendix hereto, Appendix A, *infra*. The opinion of the United States District Court for the Western District of Louisiana on remand has not been reported; it is reprinted in the appendix hereto, Appendix B, *infra*. The opinion of the Court of Appeals for the Fifth Circuit (the first appeal) is reported at 847 F.2d 1158 (5th Cir. 1988), and is reprinted in the appendix hereto, Appendix C, *infra*. The original opinion of the United States District Court for the Western District of Louisiana has not been reported; it is reprinted in the appendix attached hereto, Appendix D, *infra*.

JURISDICTIONAL STATEMENT

Invoking diversity jurisdiction under 28 U.S.C. § 1332, petitioner removed this action from state court on January 2, 1986.

On petitioner's appeal, the Fifth Circuit entered a judgment and an opinion on November 24, 1989, affirming the district court's ruling granting respondents' Motion for Summary Judgment on remand. *See*, Appendix A. Petitioner filed a petition for rehearing which was denied by the Fifth Circuit on December 29, 1989. *See*, Appendix A.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure is the only statutory provision at issue in this petition. Rule 56(c) provides, in pertinent part, that a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . ." The entirety of this statutory provision is reprinted in Appendix E, *infra*.

STATEMENT OF THE CASE

On November 27, 1985, Ida Lyons, and her two sisters, Hazel Sawyer and Catherine Hurst (hereinafter "Lyons" or "Lyons' siblings"), individually and in their capacities as respective trustees of various trusts, filed a declaratory judgment action in the Fifteenth Judicial District Court for Vermilion Parish, Louisiana, against their uncle, Franklin Fisher (hereinafter "Fisher"); Lyons also sued Hunt Oil Company, Fisher's lessee of the property giving rise to the disputed mineral interest that is the focal point of this proceeding. The Lyons' siblings sought a judicial declaration that they

owned an undivided one-half mineral interest in a tract of property located in southwestern Louisiana. The Lyons' siblings also sought a judicial declaration that the mineral lease between Fisher and Hunt Oil Company was null and void; Fisher and Hunt Oil Company signed and recorded this lease five years ago.

The facts underlying this case are relatively simple and are established by public records. The Judgment of Possession rendered in the Succession of Walter Fisher on February 23, 1945, reflects that Walter Fisher died intestate; he was survived by his wife, Julie Fisher, and their children, Hazel Fisher and Franklin Fisher. *See*, Appendix D. Pursuant to the Judgment of Possession, Julie Fisher was placed into possession of an undivided one-half interest in a parcel of property in Vermilion Parish, Louisiana; the remaining undivided one-half interest was inherited by Hazel Fisher and Franklin Fisher, subject to the right of their mother to use the property as provided by Louisiana law. *See*, Appendix D.

On December 20, 1957, Julie Fisher and her two children divided the various lands that were owned by Julie and Walter Fisher. Julie Fisher acquired the property in dispute (part of the family farm), while Hazel Fisher and Franklin Fisher received other properties which are not at issue in this proceeding. *See*, Appendix D. Since Julie, Hazel and Franklin Fisher stipulated that the minerals were to be retained with the respective properties, Julie Fisher owned the tract in question free of any mineral servitude.

In May of 1968, Julie Fisher donated by notarial act the Vermilion Parish tract to her children, Hazel Fisher and Franklin Fisher. *See*, Appendix A. In this donation, Julie Fisher reserved a mineral servitude in the property. Hazel and Franklin Fisher then sold to their 84-year old mother the usufruct over this property so their mother could continue to use and work this land for the few years she was expected to live. As is typical in many family transfers and transactions where the parties prefer not to publicly reveal the entire consideration paid as the purchase price, the parties recited

adequate consideration to be "TEN AND NO/100 ($10.00) DOLLARS and other good and valuable consideration." *See*, Appendix A. The evidence proffered by Fisher, which both the district and appellate courts excluded from judicial consideration, unequivocably established that Julie Fisher paid a considerable sum for limited use of the property, other than the recited consideration of $10.00. *See*, Appendices A and B.

On November 27, 1972, Hazel Fisher conveyed her one-half interest in the Vermilion Parish property to her brother, Franklin Fisher. *See*, Appendix A. In this transfer, Hazel Fisher sought to reserve her interest in the minerals in the property. However, because of the prior mineral reservation by her mother, which reservation afforded her mother a mineral servitude over 100% of the minerals, the mineral reservation by Hazel Fisher was without any force and effect, since Hazel Fisher did not have any rights to the minerals when she sold the property to her brother, Franklin Fisher, in 1972.

It is undisputed that from the time of the 1957 distribution of properties through May, 1978, there were no mineral operations on the property. *See*, Appendix D. Under Louisiana Mineral Code Article 27, the mineral servitude is extinguished by prescription (statute of limitations) resulting from nonuse for ten years. As a consequence, upon termination of the mineral servitude reserved by Julie Fisher, her son, Franklin Fisher, as the full owner of the property in question, was vested with 100% of the minerals.

On January 12, 1975, Julie Fisher died intestate. She was survived only by Hazel Fisher and Franklin Fisher. *See*, Appendix A. In May of 1978, the ten-year statute of limitations period for nonuse expired, thereby extinguishing the mineral servitude on the property. In November of 1978, after the accrual of the ten-year liberative prescriptive (statute of limitations) period under Louisiana Mineral Code Article 27, Ada Oil Corporation drilled a well on the property. On July 28, 1980, Hazel Fisher died intestate. As reflected by the succession documents, her three daughters accepted

unconditionally their mother's succession. In August of 1982, Franklin Fisher leased the Vermilion Parish property to Hunt Oil Company for mineral exploration; the Lyons also signed this lease. *See*, Appendix A. In March of 1985, at the instigation of Hunt Oil Company, Fisher and Hunt Oil Company executed, recorded and ratified an amendment to the 1982 lease; this amendment recognized Fisher as the sole owner of the minerals underlying the property, based upon the above-recited facts. *See*, Appendix A. Drilling and mineral production on the subject property by Hunt Oil Company, Fisher's lessee, precipitated the present dispute over the oil, gas and mineral production.

This declaratory judgment action was originally filed in state court. On January 2, 1986, this action was removed to the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, based upon diversity jurisdiction, as provided in 28 U.S.C. § 1332.

Six months after the filing of this lawsuit, Fisher filed a Motion for Summary Judgment on June 10, 1987, seeking dismissal of the Lyons' declaratory judgment action based upon the uncontroverted fact that he had acquired ownership of the disputed mineral interest through various recorded transactions, as well as through the expiration of the statute of limitations based on nonuse. By virtue of liberative prescription (statute of limitations) under Louisiana law, any mineral servitude on the property had elapsed in May of 1978. In moving for summary judgment, Fisher presupposed and postulated that even if the 1968 transaction was invalid, he had nonetheless acquired ownership of the disputed mineral interest. Thus, Fisher's summary judgment argument did not hinge on resolution of this presupposition. *A fortiori*, Fisher had no obligation to produce any evidence to the district court which established the validity of the 1968 transaction.

On October 13, 1987, the district court granted Fisher's summary judgment motion, dismissing the Lyons' lawsuit and declaring Fisher to be the owner of the mineral interest at issue. *See*, Appendix D. In the course of its opinion, the

district court specifically noted that its judgment in favor of Fisher was not contingent upon the validity of the 1968 transaction. *See*, Appendix D. On October 17, 1987, the district court also dismissed Lyons' action against Hunt Oil Company on the grounds that the summary judgment granted in favor of Fisher mooted their claim against Hunt Oil Company.

The Lyons took an appeal from the judgments entered by the district court dismissing their action. *See*, Appendix C. Among the issues presented by the Lyons for appellate review were the validity of the 1968 donation of the Vermilion Parish property to Fisher and his sister (the Lyons' mother), as well as the mother's subsequent purchase from her children of a usufruct on the property with the recited consideration of "TEN AND NO/100 ($10.00) DOLLARS and other good and valuable consideration." Focusing solely on the recited consideration of $10.00 paid to Fisher for the usufruct, a panel of the Fifth Circuit opined that $10.00 was insufficient consideration for the sale of the usufruct. *See*, Appendix C. Assuming the invalidity of the 1968 donation, the Fifth Circuit stated that Julie Fisher, who was Franklin Fisher's mother and the Lyons' grandmother, remained the owner of the tract until her death in 1975.

The Fifth Circuit determined that upon Julie Fisher's death in 1975, the property vested with Franklin Fisher under the "after acquired title doctrine" subject to a newly created servitude in favor of Lyons' mother, Hazel Fisher. Reversing the district court's summary judgment in favor of Fisher, the Fifth Circuit remanded the action for further proceedings consistent with its opinion. *See*, Appendix C. Although the Fifth Circuit acknowledged that the original district court judgment in favor of Fisher was not contingent upon the validity of the 1968 transaction, since Fisher had postulated for purposes of argument only that the 1968 transaction was invalid, the Fifth Circuit nonetheless reversed the judgment of the district court based upon its assessment of limited issues without a fully developed or even partially developed factual record. *See*, Appendix C. Consequently, Fisher has never been allowed to present to any judicial tribunal, at

either the trial or appellate level, the full extent of consideration he was actually paid for the usufruct to establish the bona fide nature of the 1968 transaction.

On remand, the Lyons immediately moved for summary judgment based on the appellate court's findings. *See*, Appendix B. The district court, erroneously concluding that it was powerless under law of the case to receive new evidence, refused to accept new, critical evidence offered by Fisher on remand in opposition to the Lyons' summary judgment motion. *See*, Appendix B. Specifically, Fisher presented evidence that he received the sum of $450.00 from Julie Fisher as consideration for the sale of the usufruct, but the district court erroneously felt this new evidence could not be considered. Although the Fifth Circuit in its first appeal commented upon the adequacy of the recited consideration of $10.00 underlying the 1968 transaction, at no time in the first panel's decision did the circuit court adjudicate whether $450.00 was adequate consideration for the sale of the usufruct, since that evidence was simply not before the Court.

Indeed, on remand, the district court specifically stated in its opinion that the $450.00 check presented by Fisher in opposing the Lyons' summary judgment was substantially *new evidence*. *See*, Appendix B. Although the district court acknowledged that Fisher's evidence after remand was new evidence, the district court erroneously concluded that the law of the case prohibited judicial consideration of this new evidence, notwithstanding the fact that this evidence clearly evinced a plain factual dispute, thereby precluding summary judgment in the Lyons' favor. *See*, Appendix B. Moreover, the evidence offered by Fisher on remand (but not considered by the district court) indicates that aside from the recited consideration of $10.00, other good and valuable consideration, including, but not limited to $450.00, was paid to him by his mother in connection with the sale of the usufruct, thereby clearly establishing the validity of the 1968 transaction.

Fisher appealed from the judgment entered by the district court granting the Lyons' Motion for Summary Judgment based on the district court's failure to consider the new

evidence proffered by him in adjudicating the Lyons' summary judgment motion. *See,* Appendix A. On appeal, the Fifth Circuit ruled that the district court had properly denied Fisher the right to offer this new evidence on remand. *See,* Appendix A. The Fifth Circuit's ruling was premised on its erroneous belief that the law of the case doctrine precluded judicial consideration of this new evidence.

In affirming the district court's judgment granting the Lyons' summary judgment after remand, notwithstanding Fisher's presentation of new countervailing evidence which the lower court refused to consider, the Fifth Circuit simply ignored jurisprudence from other circuit courts, as well as applicable decisions of this Court, which indicate that the district court was obligated to consider Fisher's proof of the adequacy of the consideration underlying the 1968 transaction. Precluding Fisher from presenting such key evidence under the guise of the law of the case is simply antithetical to prior decisions of this Court and contravenes decisions of other circuit courts which mandate that this type of new evidence be considered in summarily resolving a case.

Both the district court and the second panel of the Fifth Circuit imposed an unduly restrictive gloss on the first panel's comments under the rubric of the law of the case doctrine; as a result, summary judgment was rendered in favor of the Lyons without evaluating Fisher's countervailing evidence. Applicable decisions of this Court and other circuit courts dictate that Fisher be given the opportunity to present to the district court his key evidence regarding the adequacy of the consideration supporting the 1968 transaction. Fundamental due process dictates nothing less.

REASONS FOR GRANTING THE WRIT

Notwithstanding the foregoing chronology of events, which pointedly demonstrates that Fisher is the sole owner of all mineral interest in the property, both the district and appellate courts have erroneously concluded otherwise. The error committed by the lower courts is premised upon a gross

misapplication of the law of the case doctrine. Without allowing Fisher to present new critical evidence after remand that would firmly resolve the validity of the 1968 transaction issue in his favor based upon the substantial consideration paid for the purchase of the usufruct, the lower courts have mistakingly declared Lyons to be the owners of an undivided one-half of the mineral interest. Such a skewed and one-sided evaluation of the evidence should not be sanctioned by this Court, particularly when the courts below have arbitrarily resolved contested factual issues by summary disposition simply by ignoring countervailing evidence offered by Fisher under the mien of the law of the case doctrine.

Pretermitting Fisher's ownership of the mineral rights, Fisher submits that the district and appellate courts have clearly erred by not allowing Fisher to present key evidence which flatly contradicts the contentions in Lyons' summary judgment motion. In misconstruing the law of the case doctrine, the lower courts felt that this concept precludes consideration of new and relevant evidence on remand. It does not, as this Court clearly acknowledged in *United States v. U.S. Gypsum Company*, 340 U.S. 76 (1950).

When the Fifth Circuit considered the first appeal, Fisher's evidence as to the payment he received for the sale of the usufruct had not been submitted to the district court because it was not then an issue in the case. Indeed, in moving for summary judgment, Fisher had assumed for purposes of argument that the sale of the usufruct was invalid. However, subsequent to the circuit court's decision that the 1968 transaction lacked adequate consideration, it was apparent that the amount paid for the usufruct constituted a primary issue, since it would be determinative as to whether the consideration paid by Fisher's vendor was adequate to support the sale. Consequently, after remand, Fisher sought to introduce key evidence in opposition to Lyons' motion for summary judgment—evidence which underscored the validity of the 1968 transaction. *See*, Appendix B. Although the district court candidly acknowledged that the evidence proffered by Fisher after remand must be classified as "new" evidence, the district court simply refused to allow Fisher to

introduce this new evidence. The new evidence wrongfully precluded by the district court squarely countered Lyons' contentions in their summary judgment motion. *See*, Appendix B.

The district court's refusal to consider this important evidence submitted by Fisher was based upon its misinterpretation of the law of the case doctrine. Misapplying the law of the case, the district court precipitously and erroneously granted Lyons' summary judgment on remand. Thus, the district court declared Lyons to be the owners of the Vermilion Parish mineral interest without affording Fisher the right to present his countervailing evidence. *See*, Appendix B.

On appeal, the Fifth Circuit, ignoring applicable decisions of this Court and other circuit courts, affirmed the district court's ruling. *See*, Appendix A. The fulcrum of the Fifth Circuit's affirmance was that Fisher was obligated to produce evidence supporting the validity of the 1968 transaction when he moved for summary judgment in the district court, notwithstanding the fact that the validity *vel non* of the 1968 transaction was expressly pretermitted in Fisher's moving papers and in the district court's opinion. In an unprecedented ruling, which clearly conflicts with applicable decisions by this Court and other circuit courts, the Fifth Circuit concluded that the law of the case doctrine precluded judicial consideration of Fisher's new evidence after remand, since Fisher was obligated to proffer this evidence when he first moved for summary judgment. *See*, Appendix A.

It is critical for this Court to grant certiorari: to resolve the conflict among the circuits as to whether the law of the case doctrine prohibits any judicial consideration of new evidence after remand, when this new evidence goes to the heart of factual assumptions relied upon by the district court; concomitantly, this Court should decide whether a movant for summary judgment is obligated to address and provide evidence supporting each issue raised in a case when seeking summary judgment, even if these other issues are not germane to a summary adjudication. More specifically, this Court

should grant the present application for certiorari review because:

(1) The Decision Below Conflicts With Controlling Decisions of this Court Which Hold That the Prudential Doctrine of Law of the Case Does Not Bind a District Court to Grant Summary Judgment Amid Contested Issues of Fact Arising From New Evidence on Remand.

The Fifth Circuit's decision in this case represents a substantial departure from this Court's decision in *United States v. U. S. Gypsum Company*, 340 U.S. 76 (1950) [*hereinafter "Gypsum"*]. Under this Court's rationale in *Gypsum* the granting of a summary judgment on remand is proper only if the responding party fails to offer any evidence which controverts the factual findings by the appellate court. The Fifth Circuit chose not to follow the controlling rationale of this Court as set forth in *Gypsum*. The lower court's deviation from the *Gypsum* holding alters *sub silentio* F.R.C.P. Rule 56. Yet, revision of the Federal Rules of Civil Procedure should not be accomplished through judicial fiat.

This Court made clear in *Gypsum* that when a plaintiff moves after remand for summary judgment, a trial court may adjudicate the motion in accordance with the law of the case based on appellate conclusions *only* if no evidence which affects the appellate ruling is offered in opposition to the summary judgment. *Gypsum*, 340 U.S. at 86. In *Gypsum*, the district court had dismissed a civil suit brought by the United States under the Federal Antitrust Act. On appeal, the district court's ruling was reversed and the case was remanded for further proceedings on the grounds that the United States had established a *prima facie* case of conspiracy to violate the Act. *Gypsum*, 340 U.S at 85. In pertinent language, this Court stated that on remand the defendants had the right to introduce any evidence that would prove they did not violate the Act. Additionally, this Court emphasized that although defendants had no substantial evidence to overcome the *prima facie* conclusion of a violation of the Act, they nonetheless had the unqualified right to present facts to the Court that were pertinent to its decision. *Id.*

Succinctly stated, this Court made clear in *Gypsum* that while it is permissible for a district court to grant a summary judgment on remand, the granting of a summary judgment is proper only if no evidence is offered by defendants on remand which controverts the ruling of the appellate court. *Gypsum*, 340 U.S. at 86.

Under the controlling rationale of *Gypsum*, the Fifth Circuit's determination in the first appeal that the recited consideration of $10.00 was insufficient consideration for the sale of the usufruct did not foreclose Fisher from submitting on remand new evidence which established that other good and valuable consideration was paid for the purchase of the usufruct. Application of the *Gypsum* holding will admit of no other conclusion. Since this new evidence perforce alters the prior assumption of the panel members in the first appeal that the 1968 sale of the usufruct was supported by "nominal" consideration, this evidence should have been considered by the district court upon remand. To allow otherwise would permit a circuit court to become the initial factfinder when only a fraction of the evidence has been presented.

While acknowledging this Court's ruling in *Gypsum*, the Fifth Circuit inexplicably decided that the *Gypsum* ruling should not be applied to this case. *See*, Appendix A. The Fifth Circuit's effort to distinguish this case from *Gypsum* is so strained that it undercuts this Court's adjudication in *Gypsum*. The Fifth Circuit futilely sought to remove itself from the controlling principles in *Gypsum* on two distinct grounds. First, the Fifth Circuit opined that the earlier proceeding in the district court in *Gypsum* was resolved by a Rule 41(b) Motion in favor of the defendants, while the lower court felt that Fisher had fully presented his case before moving for summary judgment and thus had his day in court. *See*, Appendix A. The circuit court's factual assumption on this point is replete with error and is overwhelmingly refuted by the record. In moving for summary judgment, Fisher had theorized for the purpose of argument only that the 1968 transaction was invalid. Consequently, Fisher had neither the obligation nor the incentive to adduce any evidence at that time which would substantiate the validity of the 1968

transaction. For the Fifth Circuit to conclude that Fisher had fully presented his case before moving for and securing a summary judgment was clearly erroneous. To this day, Fisher has not been allowed to present his evidence to substantiate the validity of the 1968 transaction. In view of this judicial barrier to the introduction of countervailing evidence, the Fifth Circuit's determination that Fisher had presented his case is plainly wrong, and correspondingly, the Fifth Circuit's attempt to distance itself from *Gypsum* was improper and should be rectified by this Court.

The Fifth Circuit also stated this case was not subject to *Gypsum* because the first appeal in this case did not resolve the issue of consideration supporting the 1968 transaction on a *prima facie* basis, but on the basis of a final disposition. Once again, the Fifth Circuit's attempt to avoid *Gypsum* was ill-founded. This Court's decision in *Gypsum* is bereft of any language which would circumscribe the rationale of *Gypsum* to a case in which adjudication of an issue has been made on a *prima facie* basis. The Fifth Circuit further erred in determining that the issue of whether other good and valuable consideration supported the 1968 transaction had been fully adjudicated. Fisher did not need to present evidence in regard to the 1968 transaction in moving for summary judgment in the district court and consequently, when the propriety of the summary judgment rendered in favor of Fisher was decided on appeal, the record lacked evidence as to the validity of the 1968 transaction. It is readily apparent therefore that the Fifth Circuit erred in determining that this issue was adjudicated fully as part of the first appeal.

A review of the Fifth Circuit's opinion in the first appeal readily reveals that the Fifth Circuit's conclusion that the 1968 transaction was invalid was predicated on its erroneous belief that the sale of the usufruct was supported only by $10.00. Nowhere in the Fifth Circuit's first appeal is there a reference that other valuable consideration, besides the recited consideration of $10.00, was paid. *See*, Appendix C. Quite obviously the Fifth Circuit's analysis of the 1968 transaction on the first appeal was premised on the mistaken

belief that Julie Fisher did not tender additional consideration for the usufruct, other than that reflected within the four corners of the Act of Sale, namely $10.00. Fisher's proffered evidence, which was submitted for the first time on remand, clearly undermines the factual assumptions made by the Fifth Circuit in the first appeal and discloses that other consideration was paid, thereby supporting the sale of the usufruct. Clearly, under this Court's rationale in *Gypsum*, the district court was obligated to consider this new evidence on remand in adjudicating Lyons' summary judgment motion. *Gypsum* dictates nothing less. Nothing in the prior appeal should have foreclosed Fisher from presenting this new evidence on remand. The Fifth Circuit's disingenuous effort to distinguish this case from *Gypsum* falters.

This case is on all fours with *Gypsum*. Thus, the Fifth Circuit should have decided the issue of precluding Fisher's new evidence on remand under the same principles applied by this Court in *Gypsum*. The judgment below sharply conflicts with the law of this Court as set forth in *Gypsum*. Plenary review is therefore warranted so that this Court may resolve the conflict between the ruling below and applicable decisions of this Court.

(2) A Conflict Exists Among the Circuit Courts as to Whether a District Court May Grant a Summary Judgment Motion on Remand Solely in Reliance on Appellate Findings If New Evidence is Presented Which Undermines the Appellate Court's Factual Assumptions and Evidences a Factual Dispute.

Aside from being in conflict with applicable decisions of this Court, the Fifth Circuit's decision is also in conflict with other appellate decisions which indicate that a district court cannot grant a summary judgment motion after remand solely in reliance on appellate holdings if the defendant proffers new evidence on remand which evinces a factual dispute. *See, e.g., Pubali Bank v. City National Bank*, 777 F.2d 1340, 1342 (9th Cir. 1985) (hereinafter "*Pubali*"); *U.S. v. Robinson*, 690 F.2d 869, 972-73 (11th Cir. 1982) (hereinafter "*Robin-*

son"). In affirming the district court's ruling, the Fifth Circuit ruled contrary to decisions by the Ninth and Eleventh Circuits, which stem from this Court's pronouncements.

In *Pubali*, the Ninth Circuit stated that when a plaintiff moves on remand for summary judgment a district court may decide the motion in accordance with the law of the case based on appellate conclusions if no evidence that affects the appellate ruling is offered in opposition to the summary judgment. *Pubali*, 777 F.2d at 1342. In making this determination, the Ninth Circuit explicitly cited the applicable decision from this Court, namely *Gypsum, supra*. As stated by the Ninth Circuit, a trial court "cannot grant the motion [for summary judgment] solely in reliance on the appellate holding; it must examine whatever materials the defendant presents in opposition to the summary judgment. If that material produces no new evidence and evinces no factual dispute, the resolution of which might change the law applied by the appellate court, the trial court should enter judgment for the plaintiff as a matter of law." *Pubali*, 777 F.2d at 1342. Similarly, in *Robinson, supra*, the Eleventh Circuit concluded that the determination in a prior appeal was not binding as law of the case in the second appeal, since during hearings which were held on remand, new evidence was offered which undermined the factual assumptions made by the appellate court in its first appeal. *Robinson*, 690 F.2d at 972-73.

In this case, if the Fifth Circuit had followed the progeny of *Gypsum* as found in the decisions by the Ninth Circuit in *Pubali* and the Eleventh Circuit in *Robinson*, it is clear that it would have concluded that the Fifth Circuit's prior determination that the 1968 transaction was invalid was not binding as the law of the case on the district court since Fisher offered new and substantial evidence on remand which undercut the factual assumptions made by the panel in the first appeal. The new evidence submitted on remand clearly demonstrated that adequate consideration was paid by Julie Fisher for her purchase of the usufruct and thereby established the validity of the 1968 transaction. Since such evidence on remand undermines the factual assumptions made by the appellate court in the first appeal, the Fifth Circuit's earlier

opinion did not bar judicial consideration of Fisher's evidence that he wanted to present and should have been allowed to present to the district court in opposition to Lyons' summary judgment motion. *See, U.S. v. Robinson*, 690 F.2d at 972-73; *Pubali*, 777 F.2d at 1342.

The Fifth Circuit's ruling is in clear conflict with the decisions of the Ninth and Eleventh Circuits. This conflict among the circuits as to the procedure for adjudicating summary judgment motions on remand involves a frequently recurring question of law which only this Court may resolve. Consequently, this Court should grant certiorari review to resolve the conflict among the circuit courts so as to establish a uniformity of procedure for handling summary judgment motions on remand from an appellate court.

(3) The Court Below Erroneously Determined that Law of the Case Precluded Judicial Consideration of New Evidence on Remand on the Grounds that the Movant Who Had Prevailed on Summary Judgment Prior to the Appellate Court's Reversal Was Obligated to Adduce All Evidence Underlying Each Issue in the Case, Even if Such Issue Was Not Germane to a Summary Disposition.

Perhaps the most significant and unprecedented holding of the Fifth Circuit in the instant case is its determination that a movant for summary judgment must adduce all evidence underlying each issue in the case in moving for summary judgment, even if that issue is not germane to summary disposition. The decision of the Court of Appeal on this point is a disturbing one for it renders ineffectual the efficacious purpose behind summary judgment motions. This case therefore presents a question of great substance which appears to be a question of first impression in this Court, namely, whether a movant for summary judgment must adduce all evidence supporting each issue in the case, even if that issue is not germane to a summary adjudication. This is a question of evident importance which has not been, but should be decided by this Court.

The Fifth Circuit's ruling on this point emanated from its erroneous conclusion that the law of the case doctrine applied and that none of the jurisprudential exceptions to this doctrine were applicable. While it is axiomatic that a district court must be guided by the decision of an appellate tribunal on remand, this Court has consistently held that a district court may, and indeed should, consider on remand those issues not resolved by the appellate court. *See, Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979).

In the instant case, when this matter was remanded to the lower court after reversal of Fisher's summary judgment motion, the appellate court's ruling did not preclude judicial inquiry into whether consideration other than the $10.00 had been paid for the usufruct. The mere fact that the first panel concluded that the recited consideration of $10.00 was insufficient did not foreclose the district court from receiving new evidence from Fisher on remand as to whether other consideration had been paid. The issue of whether consideration other than that recited in the deed was paid was not resolved on appeal and consequently was open for the trial court's determination on remand. *Quern v. Jordan*, 440 U.S. at 347-348 n.18. Here, however, both the district and appellate courts have erroneously concluded otherwise under the guise of the law of the case.

Even if the appellate court had ruled squarely on the consideration issue in the prior appeal (which is not the case), there is a notable jurisprudential exception to the law of the case doctrine which the appellate court refused to apply. Specifically, Fisher directed the circuit court to the fact that the law of the case doctrine is not applicable if a prior appellate decision was clearly erroneous and would work manifest injustice. *See*, Appendix A. The Fifth Circuit noted in the course of its opinion that Fisher sought to rely on this exception but the panel mistakenly refused to even address it on the grounds that Fisher was obligated to adduce evidence supporting the sufficiency of the sale when he first moved for summary judgment in the district court. In sum, the Fifth Circuit penalized Fisher for not adducing evidence in moving for summary judgment, notwithstanding the fact that such evidence was not then germane to his Motion for Summary Judgment.

A review of the district court's opinion in granting Fisher's Motion for Summary Judgment reveals that the whole thrust of the summary judgment motion urged by Fisher in the lower court expressly pretermitted resolution of the validity of the 1968 land transaction. Indeed, the district court noted in its own opinion that it was unnecessary to determine whether the donation was valid or invalid for purposes of resolving Fisher's summary judgment motion. *See*, Appendix D. Fisher therefore had neither the incentive nor the obligation to produce evidence which would support the validity of this transaction and he should not now be penalized from proffering that critical evidence to the trier-of-fact on remand.

Fisher's whole argument in moving for summary judgment was premised on the fact that a factual determination as to the validity of the 1968 transaction simply did not have to be resolved. Since it was unnecessary for the issue to be resolved in the district court when Fisher first moved for summary judgment, it was not necessary for Fisher to adduce evidence as to the consideration supporting the sale of the usufruct in the prior proceedings. To the contrary, Fisher's course of action was consistent with, and indeed supported by, the controlling statutory and juridical authorities.

The end result of the Fifth Circuit's ruling is that a movant for summary judgment will now have to adduce evidence underlying each issue in the case, notwithstanding the fact that those issues may not even be germane to a summary adjudication, since the circuit court has appended this prophylactic measure to Rule 56. The ramifications of the Fifth Circuit's holding below are therefore far-reaching, expanding the substantive burden under Rule 56 far beyond the parameters imposed under Rule 56 and prior decisions of this Court. In 1986, this Court decided three seminal summary judgment cases which underscore the fact that summary judgment procedure is not to be regarded as a disfavored procedural shortcut, but rather, is to be viewed as an integral part of the Federal Rules of Civil Procedure as a whole. *See, Celotex Corporation v. Catrett*, 477 U.S 317 (1986) (hereinafter "*Celotex*"); *Matsushita Electric Industrial Company v. Zenith Radio Corporation*, 475 U.S. 574 (1986); and, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In *Celotex*, this Court noted that a party seeking summary judgment bears the responsibility of informing a district court of the basis for its motion and identifying those portions of pleadings, etc. which it believes demonstrate the absence of a genuine issue of material fact. *See, Celotex, supra.* The substantive burden imposed by this Court in *Celotex* accords with Rule 56(c) of the Federal Rules of Civil Procedure which provides that the "judgment sought shall be rendered forthwith if the pleadings, . . . show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment in its favor as a matter of law." *See*, Fed. R. Civ. Proc. 56(c), Appendix E. Neither the statutory directive of Rule 56 nor applicable decisions of this Court impose a substantive burden on a movant for summary judgment which would require that a party address and adduce evidence underlying each issue of the case if that issue is not germane to a summary disposition. Clearly, the Fifth Circuit's conclusion to the contrary in the instant case is bereft of any judicial authority and will, unless corrected, have a significant impact upon a large number of pending and future summary judgment motions. Indeed, before the Fifth Circuit's decision in this case, no court had ever ruled that such an onerous substantive burden is required under Rule 56(c). Absent approval from this Court, the Fifth Circuit has expanded the substantive burden under Rule 56 beyond the parameters of the Rule itself, beyond the burden imposed by prior decisions of this Court, and beyond the bounds of justice.

A multitude of summary judgment motions are filed every day in which movants, like Fisher, do not address each issue raised in the case if those issues are not germane to summary adjudication. The holding below, which dictates a different prerequisite, will, if allowed to stand, be completely subversive of summary judgment adjudication. It is therefore of widespread public importance that this Court consider the issue presented herein so that lower courts and litigants alike may be guided authoritatively with respect to the substantive burden imposed under Rule 56 of the Federal Rules of Civil Procedure. This is a question of signal importance which has not been, but should be, resolved by this Court.

CONCLUSION

The present case is illustrative of a serious misapplication of the prudential doctrine of the law of the case by the Fifth Circuit. The grave errors committed by the Fifth Circuit are exacerbated since they occurred in connection with an important phase of judicial proceedings, namely, remand to the district court after reversal of summary judgments on appeal. Proper application of law of the case in this context is a frequently recurring question of law which should be resolved by this Court. Plenary review is particularly warranted since the Fifth Circuit's ruling not only conflicts with applicable decisions by this Court and other appellate courts, but also frustrates the judicial efficiency of summary judgment adjudications by imposing onerous and unauthorized burdens on a movant for summary judgment such as petitioner. Certiorari review of the issues raised in this petition is essential in order to clarify the prudential limitations of the law of the case, to resolve a conflict among the circuit courts and applicable decisions of this Court as to the application of law of the case on remand and, to secure an authoritative determination by this Court as to the substantive burden imposed upon one moving for summary judgment.

In view of the substantial federal questions raised in this petition which are of primary importance to both litigants and lower courts alike, Fisher submits that full review by this Court is warranted. Indeed, so clear is the error of the Fifth Circuit Court of Appeals, that petitioner believes that the appropriate relief is summary reversal of the decision below. The unprecedented ruling of the Fifth Circuit must be rectified and calls for an exercise of this Court's power of supervision.

Respectfully submitted,

PHELPS DUNBAR MARKS
CLAVERIE & SIMS

HARRY A. ROSENBERG
Bar Number 11465
M. NAN ALESSANDRA
Bar Number 16783
Thirtieth Floor, Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 566-1311

Attorneys for Petitioner,
Franklin Lee Fisher

CERTIFICATE OF SERVICE

I, Harry A. Rosenberg, a member of the Bar of this Court, hereby certify that on this 29th day of March, 1990, three copies of the Petition for Writ of Certiorari in the above-entitled case were marked, first class postage prepaid to Patrick G. Gallaugher, Jr., counsel for all the respondents herein. I further certify that all parties required to be served have been served.

/s/ HARRY A. ROSENBERG

HARRY A. ROSENBERG
Thirtieth Floor, Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 566-1311

Attorneys for Petitioner,
Franklin Lee Fisher

APPENDIX A

IDA MARIE CUTLER LYONS, *etc., et al.*,

Plaintiffs-Appellees,

v.

FRANKLIN LEE FISHER,

Defendant-Appellant.

No. 89-4039

United States Court of Appeals, Fifth Circuit.

Nov. 24, 1989.

Plaintiffs sued for declaratory judgment recognizing their ownership of undivided one-half mineral interest in certain property allegedly acquired by their predecessor through intestacy following death of owner. The United States District Court for the Western District of Louisiana, John M. Shaw, J., granted summary judgment for defendant, and plaintiffs appealed. The Court of Appeals, 847 F.2d 1158, reversed and remanded. On remand, the District Court concluded that prior opinion of Court of Appeals established law of the case and required entry of summary judgment for plaintiffs. Defendant appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) prior Court of Appeals' panel determination grounding reversal of summary judgment on finding that there was insufficient consideration to support usufruct transfer established law of the case; (2) defendant was not entitled to offer evidence regarding consideration for usufruct under exception to law of the case doctrine applicable when evidence on subsequent trial was substantially different; and (3) defendant was not entitled to introduce evidence regarding consideration for usufruct on theory manifest injustice would be worked by application of law of the case doctrine.

Affirmed.

1. Federal Courts 950

Validity of usufruct transaction was before Court of Appeals on prior appeal from summary judgment for defen-

dant in suit for declaratory judgment recognizing plaintiffs' ownership of undivided one-half mineral interest in property allegedly acquired by predecessor by intestacy following death of property owner, and prior panel opinion was law of the case; both parties briefed sufficiency of consideration supporting usufruct transaction in district court, plaintiffs urged lack of consideration for usufruct sale as cornerstone of their argument, and reversal of summary judgment was grounded on finding that there was insufficient consideration to support usufruct transfer.

2. Federal Courts 950

Defendant in dispute regarding ownership of mineral interest was not entitled to adduce on remand evidence that $450 consideration was paid for usufruct under exception to law of the case doctrine applicable when evidence on subsequent trial was substantially different, after summary judgment in defendant's favor was reversed by the Court of Appeals' panel based on finding that there was insufficient consideration to support transfer of usufruct; defendant was not entitled on remand to offer evidence which he had had every opportunity and incentive to produce at earlier proceeding.

3. Federal Courts 950

Defendant in dispute regarding ownership of mineral interest did not show that applying law of the case doctrine would work manifest injustice upon him based on prior Court of Appeals' panel's reversal of summary judgment for defendant based on finding that there was insufficient consideration to support usufruct transfer, although defendant on remand submitted affidavit stating his mother paid $450 for usufruct interest; defendant flatly failed to adduce evidence of any consideration in earlier proceedings despite having reason and opportunity to do so.

4. Federal Courts 950

Defendant who had fully presented his case in dispute regarding ownership of mineral interest before moving for

and securing summary judgment was not entitled to retry issues that were litigated and decided by Court of Appeals, which reversed summary judgment for defendant, based on finding there was insufficient consideration to support usufruct transfer.

I.P. Saal, Jr., Gueydan, La., Raymond A. Beyt, Lafayette, La., Harry A. Rosenberg, M. Nan Alessandra, New Orleans, La., for defendant-appellant.

Edwin K. Hunter, Patrick Gallaugher, Jr., J. Michael Veron, Scofield, Bergstedt, Gerard, Mount & Veron, Lake Charles, La., Patrick W. Gray, Lafayette, La., for plaintiffs-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before KING, JOLLY and DUHE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case is before us a second time on appeal. In this appeal we address whether the district court erred in concluding that the prior opinion of this court established the law of the case regarding the consideration supporting a 1968 land transaction and thus required it to enter summary judgment for the plaintiffs, thereby recognizing their mineral rights in the property.

I

A.

We adopt the prior panel's statement of the relevant facts and procedural history.

On May 7, 1968, Julie Fisher donated the northwest quarter of section 84, township 11 south, range 3 west, Vermillion Parish, Louisiana ("Northwest Quarter"), to her son, Franklin Fisher, and daughter, Hazel, in indivision. In this donation, Julie Fisher reserved a mineral servitude in

the Northwest Quarter. The very next day, May 8, 1968, Franklin and Hazel purportedly sold the usufruct[1] of the Northwest Quarter's surface to their mother, Julie, for ten dollars ($10.00) and "other good and valuable consideration and services rendered". It is the validity of this transaction that constitutes the core of this litigation.

On November 27, 1972, Hazel Fisher conveyed her interest in the Northwest Quarter to Franklin Fisher, reserving a mineral servitude. Julie Fisher died intestate on January 12, 1975. She was survived only by Hazel and Franklin, so that they inherited her estate in indivision. In November 1978, mineral operations commenced on the Northwest Quarter. On July 28, 1980, Hazel died intestate.

In August 1982, Hazel's heirs and Franklin Fisher jointly leased the Northwest Quarter for mineral exploration to Hunt Oil Co. In March 1985, Franklin and Hunt Oil executed an amendment to the 1982 lease in effect recognizing Franklin as the sole owner of the minerals underlying the Northwest Quarter.

On November 27, 1985, Hazel's heirs commenced an action in Louisiana state court, seeking a declaratory judgment recognizing their ownership of an undivided one-half mineral interest in the Northwest Quarter. The defendants removed the suit to federal court on the basis of diversity jurisdiction. The district court then granted Franklin Fisher's motion for summary judgment, recognized him as the owner of the disputed mineral servitude and dismissed the complaint. The court, however, declined to adjudicate the validity of the 1968 transaction. It noted that, assuming the transaction was valid, Hazel Fisher, the Lyons' mother, could not have legally reserved a mineral servitude in that property in 1972 because the mineral rights were then held by her mother. Since drilling on the land did not commence until after May 1978, Franklin, who had acquired title to the remainder of the surface estate by virtue of Hazel's conveyance in 1972,

---

[1] "Generally speaking a person who has a usufruct over immovable property has two basic rights—the right to possess, use and enjoy the property and the right to receive the fruits produced by the property." *Clark v. Brecheen, 387So.2d 1297, 1301 (La.Ct.App. 1st Cir.1980).*

acquired title to the mineral estate through prescription. The court next assumed that the 1968 transaction was invalid as a disguised usufruct reservation; it noted that in that case, Franklin acquired title to the surface estate in 1975 by virtue of the Louisiana after-acquired-title doctrine and to the mineral estate in 1978 by virtue of prescription. The plaintiffs appealed to this court. *Lyons v. Fisher*, 847 F.2d 1158, 1158-59 (5th Cir.1988).

B.

On appeal, a panel of this court reversed the district court's order granting the defendant Franklin Fisher summary judgment. The panel reasoned that the lower court had "erroneously assumed" that regardless of the validity of the 1965 transaction, Franklin acquired title by liberative prescription in May 1978. 847 F.2d at 1160. On the contrary, the panel concluded, when prescription occurred is "wholly dependent upon the validity of the 1968 transaction." *Id.* The panel, then, proceeded to evaluate the transaction and concluded that it did not involve a sale at all. Instead, it was a "disguised usufruct reservation" prohibited under section 1533 of the Louisiana Civil Code, which provides: "The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself." The court, therefore, held that the 1968 transaction was an "absolute nullity" and, under the Louisiana after-acquired-title doctrine, the mineral servitude Hazel Fisher reserved to herself as part of her conveyance of her interest in the Northwest Quarter in 1972 became effective upon the death of her mother in 1975. The court, then, remanded the case to the district court for "further proceedings consistent with this opinion."

On remand, the plaintiffs Lyons moved for summary judgment, citing the panel's opinion. In response, Fisher filed an affidavit asserting that his mother had paid him and his sister $450 for the usufruct in 1968 and contended, therefore, that the transaction was not, as the opinion of this

court had held, a disguised usufruct reservation. The district court, however, refused to consider the evidence, holding that the decision of this court that the 1968 transaction was an "absolute nullity" precluded the district court from further considering the case. Accordingly, the district court entered summary judgment for the plaintiffs Lyons. Fisher appeals.

II

In this appeal, Fisher argues that the district court erred in concluding that the prior panel decision established the law of the case regarding the sufficiency of the consideration for the 1968 usufruct sale; second. that, assuming the law of the case applies, the district court erred in refusing to apply the "substantially different evidence" and the "manifest injustice" exceptions to the doctrine. Specifically, he argues that his affidavit, in which he stated that his mother paid $450 for the usufruct constituted "substantially different evidence," which should have been considered by the district court on remand; he asserts that the prior panel's conclusion that the consideration paid by Julie Fisher for the 1968 usufruct was "not fixed and determined" as required by article 2464 of the Louisiana Civil Code was "clearly erroneous" and its refusal to consider his evidence to the contrary would work "manifest injustice." Finally, Fisher argues that because there remained a genuine issue of material fact concerning the consideration supporting the 1968 usufruct, the district court erred in granting summary judgment.

III

A.

[1] We first consider whether the prior panel opinion established the law of the case with respect to the adequacy of the consideration in the 1968 transaction. The "law of the case" doctrine provides that "a decision of a factual or legal issue by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court. . . ." *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1005 (5th Cir.1982) (quoting *White v. Murtha*, 377 F.2d 428,

481-82 (5th Cir.1967)). This rule is "based on the salutary and sound public policy that litigation should come to an end." *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1319 (5th Cir. 1978) (quoting *White v. Murtha*, 877 F.2d at 443).

After an examination of the previous proceedings and appeal in this case, we must conclude that the validity of the 1968 usufruct transaction was before the prior panel of this court and that the panel clearly and expressly decided the question in favor of the Lyons. In the initial proceedings before the district court, both parties briefed the sufficiency of the consideration supporting the 1968 transaction. Indeed, throughout the litigation, the Lyons urged the lack of consideration for the 1968 usufruct sale as the cornerstone of their argument that they owned a one-half mineral interest in the Northwest Quarter. In their memorandum in opposition to Fisher's motion for summary judgment, the Lyons contended that "the nominal consideration of $10 is not considered serious consideration and the so-called 'sale' of the usufruct was in truth a donation." In their motion to supplement the exhibits in oppositon to Fisher's motion for summary judgment, the Lyons attached Fisher's deposition in which he essentially conceded that the usufruct transaction was a gift, not a sale.

For his part, in the previous proceedings Fisher pled the validity of the 1968 transaction in his motion for summary judgment. He rebutted the Lyons' assertion that the usufruct transaction was not a sale by adverting to the language of the conveyance ("$10 and other good and valuable consideration and services rendered") and attempting to thrust the burden of proof regarding the "other good and valuable consideration" onto the appellees.

Although in the previous proceedings the district court did not decide whether the 1968 usufruct sale was valid, concluding that Fisher nonetheless acquired title to the mineral rights by prescription in 1978, on appeal this issue was squarely briefed and argued before the prior panel. There can be no doubt that the panel grounded its reversal of summary judgment on its finding that there was insufficient

consideration to support the 1968 transfer of the usufruct. The court noted, "Ten dollars is insufficient consideration for the lifetime usufruct of almost any property, except perhaps a square foot of swampland in the Atchefalaya Basin. . . . Clearly this transaction violated former article 1533, which makes it an absolute nullity to be ignored by this Court." *Lyons v. Fisher*, 847 F.2d 1158, 1160-61 (5th Cir. 1988). Consequently, the panel's decision that there was insufficient consideration established the law of the case and, absent an exception to the law-of-the-case doctrine, required the district court to enter summary judgment for the Lyons.

B.

(1)

We thus turn to consider whether the district court should have recognized as exception to the law-of-the-case doctrine. We have held that the law-of-the-case will not apply where (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such cases, or (3) the decision was clearly erroneous and would work manifest injustice. *Goodpasture*, 688 F.2d at 1006. Fisher argues that we should apply the first and third exceptions, but we decline to do so.

[2] Fisher argues that the district court should have considered, as an exception to the law-of-the-case doctrine, evidence adduced on remand that his mother paid him and his sister $450 for the usufruct because it was new evidence and "substantially different" from evidence produced at trial. We have held that the " 'substantially different' evidence exception to the law-of-the-case doctrine does not apply where a prior appeal has not left the issue open for decision." *Goodpasture*, 688 F.2d 1003, 1006 n. 5. The prior panel emphatically held that there was insufficient consideration for the "sale" of the usufruct; indeed, it thrice characterized the transaction as an "absolute nullity." 847 F.2d at 1161, 1162. This issue was therefore foreclosed on remand. Thus, the district court properly denied Fisher the right on remand

to offer evidence that he had had every opportunity and incentive to produce at the earlier proceeding.

(2)

[3] Fisher argues next that the district court erred in refusing to hold the law-of-the-case doctrine inapplicable because the panel's decision was "clearly erroneous" and the error works "manifest injustice." Specifically, he contends that the prior panel misinterpreted Louisiana precedent as requiring that the contract price must be expressed within the four corners of the document in order that it be "fixed and determined" within the meaning of article 2464 of the Louisiana Civil Code. This error of law, he contends, works the injustice, if the law-of-the-case doctrine is applied, of precluding his introducing evidence that adequate consideration was in fact paid for the usufruct.

We need not decide whether Louisiana law requires a price term to be included within a contract of sale for it to be "fixed and determined," because we perceive no manifest injustice to Fisher. We might be persuaded that manifest injustice had occurred as a result of the alleged error if Fisher had presented such evidence in the prior proceeding and the previous panel had disregarded the evidence because of a misunderstanding of the law, or if consideration had become an issue only after it reached the appellate level and Fisher had had no opportunity in the prior proceeding to adduce such evidence. The truth is, however, that Fisher flatly failed in the prior proceeding, for reasons best known to him, to adduce evidence of any consideration, despite his having both the reason and opportunity to do so. It was only after this court rendered its decision, and it became apparent that consideration was indeed the win-lose issue of this case, that Fisher belatedly attempted to introduce evidence of additional monetary consideration. Thus, given his opportunity and his puzzling failure to adduce such evidence earlier, we hold that Fisher has not suffered "manifest injustice" simply because the law-of-the case doctrine may now preclude his tardy introduction of that evidence.

C.

[4] Notwithstanding the absence of the usual exceptions to the law-of-the-case doctrine, Fisher argues that the district court erred in applying the doctrine to exclude introduction of additional evidence, because, under *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 85, 71 S.Ct. 160, 167-68, 95 L.Ed. 89 (1950), he was entitled to introduce additional evidence on remand. He argues further that if allowed to introduce evidence of consideration, he would have created a genuine issue of material fact, thus making summary judgment inappropriate.

Gypsum, however, is a much different case. In that case, the United States sued the gypsum board manufacturers for price fixing in violation of the Sherman Act. At the close of the government's case-in-chief, and before the defendants offered any evidence, the defendants successfully moved to dismiss the complaint under Federal Rule of Civil Procedure 41(b). On direct appeal, the Supreme Court reversed, holding that the government's evidence established a prima facie case of conspiracy prohibited by the Sherman Act, and remanded "for further proceedings in conformity with [its] opinion." *U.S. v. U.S. Gypsum Co.*, 838 U.S. 364, 401, 68 S.Ct. 525, 544-45, 92 L.Ed. 746. On remand, the district court rejected the defendants' proffer of evidence and granted the government's motion for summary judgment. The defendants objected to the summary judgment disposition of the case on the ground that they had the right to introduce evidence to counter the government's prima facie case. In upholding the district court's grant of summary judgment, the Supreme Court observed:

> Of course, when we remanded the case to the District Court the defendants had the right to introduce any evidence that they might have as to why all or any one of them should be found not to have violated the Sherman Act. . . . Such rights, however, did not require the trial court to admit evidence that would not affect the outcome of the proceedings. They did not affect the

> power of the trial court to direct the progress of the case in such a way as to avoid a waste of time.
>
> A summary judgment, under rule 56, was permissible on remand.

340 U.S. at 85, 86, 71 S.Ct. at 167, 168.

It is clear to us that *Gypsum* offers no support to Fisher's position. Here, the earlier proceeding in the district court was not disposed of on a Rule 41(b) motion in favor of the defendants; rather, Fisher fully presented his case before moving for, and securing, a summary judgment. Unlike the defendants in *Gypsum*, Fisher has had his day in court. Furthermore, unlike the first opinion of the Supreme Court in *Gypsum*, the previous panel here did not decide the issue of consideration on a prima facie basis, but on the basis of a final disposition. Therefore, after the previous panel reversed summary judgment and remanded for "further proceedings consistent with [its] opinion," the district court, acting consistent with the Supreme Court's affirmance of summary judgment in *Gypsum*, rejected Fisher's efforts to retry issues that had been litigated and decided in the previous proceeding in the case, and properly granted summary judgment to the plaintiffs.

IV

For the reasons stated above, we hold that the district court properly applied the law-of-the-case doctrine, and properly granted summary judgment. Its judgment is therefore

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-4039

IDA MARIE CUTLER LYONS, etc., *et al.*,
Plaintiffs-Appellees,

versus

FRANKLIN LEE FISHER,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING
(DECEMBER 29, 1989)

Before King, Jolly and Duhe, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

IDA MARIE CUTLER LYONS, *et al*

vs.

FRANKLIN LEE FISHER, *et al*

CIVIL ACTION NUMBER 85-3629

SECTION O
JUDGE SHAW
MAGISTRATE METHVIN

RULING

Now before the court is a motion for summary judgment filed by the plaintiffs seeking to be declared the owners of an undivided one-half of the minerals underlying the Northwest Quarter of Section 34, Township 11 South, Range 3 West, in Vermilion Parish, Louisiana ("Northwest Quarter"). Also the plaintiffs ask that this court declare null and void a certain "Declaration, Amendment and Ratification of Oil, Gas and Mineral Lease", executed between the defendants, Franklin Lee Fisher and Hunt Oil Company, whereby Franklin Lee Fisher claims to own the plaintiffs' mineral interest.

On October 13, 1987, this court ruled that defendant, Franklin Lee Fisher, owned the mineral interest claimed by the plaintiffs and granted a summary judgment dismissing plaintiffs' suit. This court subsequently dismissed the plaintiffs' claims against Hunt Oil Company on grounds of mootness.

The plaintiffs appealed, and the United States Court of Appeals for the Fifth Circuit reversed and remanded this case for further proceedings consistent with its opinion. This motion for summary judgment is submitted in accordance with the opinion issued by the Court of Appeals. *Lyons v. Fisher*, 847 F.2d 1158 (5th Cir. 1988).

One of the primary issues on appeal involved whether the 1968 sale of a usufruct for ten dollars and "other good and valuable consideration" was a disguised reservation of a usufruct in violation of an earlier version of Louisiana Civil Code article 1533. The appeals court in answering this question in the affirmative, addressed the merits of this issue.

The plaintiffs asserted that the 1968 transaction included a disguised usufruct reservation, because the usufruct sale was supported by the nominal consideration of ten dollars. To this issue, the defendant's only rebuttal was that the consideration was more than nominal because the parties' agreement cited "other good and valuable consideration."

> The Court of Appeals concluded:
> Ten dollars is insufficient consideration for the lifetime usufruct of almost any property....The recital of 'other good and valuable consideration' does not change our analysis, because Louisiana Civil Code article 2464 requires a contract to have a 'fixed and determined' price. The timing of this transaction also reveals its disguise; the usufruct 'sale' occurred the day after Julie Fisher donated the Northwest Quarter to her children. Clearly this transaction violated former article 1533, which makes it an absolute nullity to be ignored by this Court.

It is clear that the Court of Appeals considered and decided the issue of the validity of the 1968 donation. The defendants, in order to defeat plaintiffs' motion for summary judgment, seek to have this court reconsider an issue expressly decided by the Court of Appeals.

In support of their position, the defendants assert that $450.00 cash was paid by Mrs. W.F. Fisher to Colonel Franklin Lee Fisher as further consideration for the sale. The defendants claim that because this new evidence was not before the Court of Appeals when the issue of the validity of the 1968 transaction was decided, this court may reconsider the issue. This court must disagree.

The Court of Appeals was quite specific in its ruling that this case be remanded for further proceedings consistent

with its opinion. This court is bound by the findings and conclusions of the appeals court, and may not now upset the appeals court findings by accepting new evidence on this already decided issue.

The Court of Appeals found that the 1968 transaction "violated former article 1533, which makes it an absolute nullity to be ignored by this Court." This court is not in a position to upset the conclusions of the Court of Appeals and will not accept that the defendant's newly discovered evidence, excused only by the defendant's "lapse of memory", as sufficient reason to do so.

Therefore, the plaintiffs' motion for summary judgment is hereby GRANTED, and plaintiffs are entitled as a matter of law to judgment in their favor as prayed for in this suit.

Counsel for plaintiffs shall submit a judgment in accordance with this ruling within ten (10) days of this date.

Opelousas, Louisiana, December 16, 1988.

JOHN M. SHAW

JOHN M. SHAW
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

IDA MARIE CUTLER LYONS, *etc.* *et al*	CIVIL ACTION NUMBER 85-3629 Section "O"
vs.	
FRANKLIN LEE FISHER and HUNT OIL COMPANY	HONORABLE JOHN M. SHAW

JUDGMENT

This action came on for hearing on the Motion for Summary Judgment filed by the plaintiffs against the defendants, FRANKLIN LEE FISHER and HUNT OIL COMPANY, the Honorable John M. Shaw, District Judge, presiding. All issues were briefed by the parties, and duly considered by the Court. The Court now concluding that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits duly filed in the record, show that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law, and for reasons set forth in the Ruling issued by the Court on December 16, 1988, and duly filed in the record;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by the plaintiffs against the defendants is hereby granted, and, accordingly, the plaintiffs, IDA MARIE CUTLER LYONS, individually and as trustee for the IDA MARIE LYONS CLASS TRUST and as co-trustee of THE SAS TRUST, THE JWH TRUST, THE BKH TRUST, THE RCH TRUST, THE SEG TRUST, THE SMS TRUST, THE CML TRUST, THE RLC TRUST and THE BKL TRUST; CATHERINE CUTLER HURST, individually and as trustee of THE

CATHERINE HURST TRUST; HAZEL PAULINE CUTLER SAWYER, individually and as trustee of THE HAZEL SAWYER CLASS TRUST, and as co-trustee of THE SAS TRUST, THE JWH TRUST, THE BKH TRUST, THE RCH TRUST, THE SEG TRUST, THE SMS TRUST, THE JBS TRUST and THE GSM TRUST; and HAZEL PAULINE CUTLER SAWYER, as co-trustee of the CML TRUST, THE RCL TRUST and THE BKL TRUST, are hereby recognized as and declared to be the legal owners of the immovable property described as follows:

> A mineral servitude covering an undivided one half of all of the oil, gas, and other minerals in, on or under, or which may be produced from the Northwest Quarter of Section 34, Township 11 South, Range 3 West, in Vermilion Parish, Louisiana,

as each of said owners' mineral interest may appear of record, and that the said legal owners are as such entitled to possession of the said mineral interest, and to all of the rights, privileges and fruits of the ownership thereof;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that that certain document entitled "Declaration, Amendment and Ratification of Oil, Gas & Mineral Lease," a copy of which is attached as Plaintiffs' Exhibit "R" to the Plaintiffs' First Supplemental and Amended Petition for Declaratory Judgment, executed on March 19, 1985, by and between Franklin Lee Fisher, Mary Elaine Brock Fisher and Hunt Oil Company, and filed on March 21, 1985 in the conveyance records of Vermilion Parish, under file number 8503710, purporting to pertain to the minerals underlying the above-described property, be and is hereby declared by the Court null and void, and the Clerk of Court of Vermilion Parish, Louisiana shall and is hereby ordered to erase and cancel from the conveyance records of that Parish the said document.

JUDGMENT READ AND SIGNED in chambers at Opelousas, Louisiana, this 27th day of December, 1988.

HONORABLE JOHN M. SHAW

HONORABLE JOHN M. SHAW
United States District Judge

APPENDIX C

IDA MARIE CUTLER LYONS, *etc. et al.*,

Plaintiffs-Applellants

vs.

FRANKLIN LEE FISHER, AND HUNT OIL COMPANY

Defendants-Appellees.

No. 87-4842

United States Court of Appeals, Fifth Circuit

June 27, 1988.

Plaintiff sued for declaratory judgment recognizing their ownership of undivided one-half mineral interest in certain property allegedly required by intestate following death of mother. The United States District Court for the Western District of Louisiana, John M. Shaw, J., granted summary judgment for defendant, and plaintiff appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) transaction, whereby mother donated property to offspring and they immediately sold her the usufruct back for purely nominal consideration, was merely a disguised reservation of usufruct, which violated Louisiana law, and (2) intestate's conveyance of land and reservation of mineral servitude therein both became effective only when intestate acquired interest therein on mother's death.

Reversed and remanded.

1. Gifts 4

Transaction, whereby mother donated property to offspring and they immediately sold her a usufruct back for purely nominal consideration, was void under Louisiana law as disguised reservation of a usufruct LSA-C.C. art. 1533.

2. Estoppel 35

Mines and Minerals 55(7)

Nonowner's conveyance of land and reservation of mineral servitude both became effective, under after-acquired title doctrine, only when nonowner acquired property on mother's death; mineral servitude was created on that date, for purpose of statute providing that such servitudes may be extinguished by ten years of non-use. LSA-R.S. 31:27-31:41.

Patrick D. Gallaugher, Jr., J. Michael Veron, Edwin K. Hunter, Lake Charles, La., for plaintiffs-appellants.

J.P. Saal, Jr., Gueydan, La., Raymond A. Beyt, Pat W. Gray, Lafayette, La., for defendants-appellees.

Appeals from the United States District Court for the Western District of Louisiana.

Before WISDOM, GEE, and JONES, Circuit Judges.

WISDOM, Circuit Judge:

This appeal presents two questions: (1) Whether a 1938 sale of a usufruct for ten dollars and "other good and valuable consideration" was a disguised reservation of a usufruct in violation of an earlier version of Louisiana Civil Code article 1533?; and (2) Whether, under the Louisiana Civil and Mineral Codes, a nonowner's conveyance of land and reservation of a mineral servitude both became effective when the nonowner inherited the property? Because we agree with the plaintiffs that both questions must be answered in the affirmative, we reverse the district court's grant of summary judgment in favor of the defendant, and we remand this case.

I. FACTS AND PRIOR PROCEEDINGS

On May 7, 1968, Julie Fisher donated the northwest quarter of section 34, township 11 south, range 3 west, Vermillion Parish, Louisiana ("Northwest Quarter"), to her

son, Franklin Fisher, and daughter, Hazel, in indivision. In this donation, Julie Fisher reserved a mineral servitude[1] in the Northwest Quarter. The very next day, May 8, 1968, Franklin and Hazel purportedly sold the usufruct[2] of the Northwest Quarter's surface to their mother, Julie, for ten dollars ($10.00) and "other good and valuable consideration and services rendered". On November 27, 1972, Hazel Fisher conveyed her interest in the Northwest Quarter to Franklin Fisher, reserving a mineral servitude. Julie Fisher died intestate on January 12, 1975. She was survived only by Hazel and Franklin, so that they inherited her estate in indivision. In November 1978, mineral operations commenced on the Northwest Quarter. On July 28, 1980, Hazel died intestate.

In August 1982, Hazel's heirs and Franklin Fisher jointly leased the Northwest Quarter for mineral exploration to Hunt Oil Co. In March 1985, Franklin and Hunt Oil executed an amendment to the 1982 lease in effect recognizing Franklin as the sole owner of the minerals underlying the Northwest Quarter.

On November 27, 1985, Hazel's heirs commenced this action in Louisiana state court, seeking a declaratory judgment recognizing their ownership of an undivided one-half mineral interest in the Northwest Quarter. The defendants removed the suit to federal court on the basis of diversity jurisdiction. Under Franklin Fisher's motion for summary judgment, the district court recognized Franklin as the owner

---

[1] "A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership." La. Rev.Stat.Ann § 31:21 (West 1975). In Louisiana, "oil and gas are not subject to absolute ownership as specific things apart from the soil of which they form part; and a grant or reservation of such oil and gas carries only the right to extract such minerals from the soil". *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207, 243 (1922). *See* McDougal, *Louisiana Mineral Servitudes*, 61 Tul.L.Rev. 1097, 1098-1100 (1987) (hereinafter McDougal).

[2] "Generally speaking, a person who has a usufruct over immovable property has two basic rights—the right to possess, use and enjoy the property and the right to receive the fruits produced by the property." *Clarke v. Brechean*, 387 So.2d 1297, 1301 (La. Ct.App. 1st Cir.1980).

of the disputed mineral servitude and dismissed the complaint. The plaintiffs appeal.

II. DISCUSSION

The plaintiffs argue that Julie Fisher's 1968 donation and her children's reciprocal sale of the usufruct together violated former Louisiana Civil Code article 1533[3] as a donation with a disguised usufruct reservation, an absolute nullity, which must be ignored by this Court. Under this rationale, Julie Fisher had ownership of the Northwest Quarter until her death in 1975. The plaintiffs next urge the application of the "after acquired title" doctrine; they argue that Hazel Fisher's 1972 Northwest Quarter conveyance and mineral servitude reservation both became effective in 1975 when by intestacy Hazel acquired title to a one-half interest in the Northwest Quarter. Thus, the mineral servitude was created in 1975, and it was not extinguished by liberative prescription for ten years nonuse,[4] because mineral operations on the Northwest Quarter commenced in 1978.

The defendant disputes each level of the plaintiff's analysis. The defendant contends that the 1968 usufruct sale did not violate Civil Code article 1533, because the sale was supported by sufficient consideration. The defendant next argues that Hazel Fisher's 1972 mineral servitude reservation was invalid because Mineral Code article 24[5] allows only a landowner to create a mineral servitude. The defendant also contends that the plaintiffs' after acquired title argument is precluded by Mineral Code article 76,[6] prohibiting the reservation of a mineral servitude expectancy.

A. *The 1968 Transaction and Article 1533*

[1] At first glance, one might think that review of this issue is unnecessary. The district court stated that its judgment was not dependent on the 1968 transaction's validity. The district court reasoned that under any analysis

---

[3] See note 7 and accompanying text.

[4] *See generally* La.Rev.Stat.Ann. §§ 31:27-:41 (West 1975).

[5] See note 25.

[6] See note 16 and accompanying text.

the mineral servitude was extinguished in 1978 by liberative prescription, but the district court erroneously assumed that under any analysis the liberative prescription period commenced in 1968. Both the plaintiffs and the defendant agree that, if the 1968 transaction violated article 1533, a mineral servitude was not created in 1968, and the liberative prescription period did not then commence. The district court's analysis is wholly dependent upon the validity of the 1968 transaction. We must, therefore, review the merits of this issue.

The plaintiffs argue that the 1968 transaction violated former Louisiana Civil Code article 1533, which stated: "The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, *but cannot reserve it for himself.*"[7] This provision was amended in 1974,[8] but Louisiana courts have given the amendment only prospective application.[9] The 1968 transaction therefore is governed by the earlier article. According to the plaintiffs, the 1968 transaction included a disguised usufruct reservation, because the usufruct sale was supported by the nominal consideration of ten dollars. The defendant's only rebuttal is that the consideration was more than nominal because the parties' agreement cited "other good and valuable consideration".

Louisiana jurisprudence supports the plaintiffs' argument. In *Clarke v. Brecheen*[10] the court analyzed an analogous

---

[7] La.Civ.Code art. 1533 (J. Dainow ed. 1961) (emphasis added). Article 1533 was intended to insure compliances with Louisiana's procedures for mortis causa donations. A donation of property with a usufruct reservation is a donation mortis causa, but it is made in the form of an inter vivos donation. A donation mortis causa must be made by a last will and testament, La.Civ.Code Ann. art. 1570 (West 1987), whereas an inter vivos donation "is an act by which the donor divests himself, at present and irrevocably, of the thing given". *Id.* art. 1468. The redactors of the 1825 Code inserted the prohibition against usufruct reservations to prevent concealment of the property transfer. *See Clarke v. Brecheen*, 387 So.2d 1297, 1301 (La.Ct.App. 1st Cir.1980); *Succession of Delaune*, 138 So.2d 41, 49-50 (La.Ct.App. 1st Cir.1962).

[8] *See* Act No. 210, 1974 La. Acts 531.

[9] *See, e.g., Clarke v. Brecheen*, 387 So.2d 1297 (La.Ct.App. 1st Cir. 1980); *Estate of Richard v. Richard*, 321 So.2d 375 (La.Ct.App. 3d Cir. 1975).

[10] 387 So.2d 1297 (La.Ct.App. 1st Cir.1980).

problem: the validity of a usufruct reservation was dependent on whether the underlying property transfer was a sale or a donation. The plaintiff argued that the property transfer was a donation supported by nominal consideration, where the authentic act read:

> DONOR declares that the subject donation is executed in favor of DONEE in consideration of the gratitude and affection DONOR bears for DONEE *because of the assistance and services rendered* by DONEE to DONOR.[11]

The court agreed that the transfer was a donation because of the insufficient consideration, and the court then held that the plaintiff's reservation of the "use and habitation" of the property violated article 1533.

The facts in this case are distinguishable from those in *Clarke* but the same analysis applies to both cases. Here the parties did not disguise the underlying property transfer, which they admitted was a donation. The parties instead disguised the usufruct reservation as a usufruct "sale". The plaintiffs are correct in characterizing the usufruct sale's consideration as nominal. Ten dollars is insufficient consideration for the lifetime usufruct of almost any property,[12] except perhaps a square foot of swamp land in the Atchafalaya Basin. The recital of "other good and valuable consideration" does not change our analysis, because Louisiana Civil Code article 2464 [13] requires a contract to have a "fixed and determined" price.[14] The timing of this transaction also reveals its disguise; the usufruct "sale" occurred the day after Julie Fisher donated

---

[11] 387 So.2d at 1299 (emphasis added).

[12] The "sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised". La.Civ.Code Ann. art. 2464 (West 1952). See also *Spanier v. DeVoe*, 52 La.Ann. 581, 27 So. 174, 175 (1900), invalidating a conveyance of immovable property as a disguised donation because the consideration of five dollars was a "mere incident".

[13] "The price of the sale must be certain, that is to say, fixed and determined by the parties". La.Civ.Code Ann. art. 2464 (West 1952).

[14] In the old case of *Conway v. Bordier*, 6 La.346 (1834), for example, the Louisiana Supreme Court invalidated a contract that recited "a good and valuable consideration" as violative of article 2454's predecessor, article 2439 of the 1825 Code.

the Northwest Quarter to her children. Clearly this transaction violated former article 1533, which makes it an absolute nullity to be ignored by this Court.[15]

B. *The Mineral Servitude and the After Acquired Title Doctrine*

[2] Because the 1968 transaction was an absolute nullity, Hazel and Franklin Fisher did not acquire ownership of the Northwest Quarter until their mother's death in 1975. We must now determine whether in 1972 Hazel Fisher could transfer her future interest in the Northwest Quarter subject to a mineral servitude reservation. The plaintiffs argue that Hazel's conveyance and reservation are valid under the after acquired title doctrine. The defendant admits that Hazel could transfer her after acquired interest in the Northwest Quarter, but the defendant argues disingenuously that her mineral servitude reservation violated Mineral Code article 76.

Article 76 states: "The expectancy of a landowner in the extinction of an outstanding mineral servitude cannot be conveyed or reserved directly or indirectly."[16] This article codifies the holding of *Hicks v. Clark*[17] that "the reversionary interest is not an object to commence".[18] In *Hicks* Raines sold property to Brown reserving a mineral servitude. Brown then sold the property to the Hicks Co. subject to Raines's outstanding mineral servitude. Hicks then sold the property to the Red Chute Land Co. subject to a "right of reversion"[19] of Raines's outstanding mineral servitude. When Raines's mineral servitude expired, Hicks's successors claimed ownership of the servitude. The court found, however, that the current landowner gained the right to explore for minerals,

---

[15] *See* La.Civ.Code Ann. art. 2030 (West 1967).

[16] La.Rev.Stat.Ann. § 31:76 (West 1975).

[17] 225 La. 133, 72 So.2d 322 (1954); *see also* Note, 15 La.L.Rev. 231 (1954).

[18] La.Rev.Stat.Ann § 31:76 comment. *See also* McDougal at 1106-08; McCollum, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 Tul.L.Rev. 729, 752-54 (1976).

[19] *Hicks*, 72 So.2d at 323. Professor McDougal has noted that the *Hicks* "court used the term right of reversion, but no such term exists in the civil law". McDougal, at 1106 n. 49.

because the ownership of the land and the mineral servitude merged upon the expiration of the servitude. Hicks's reservation of the expectancy "would cause the land to be burdened with a mineral servitude for a longer period than 10 years without user, contrary to the public policy of this state that the right to explore for oil, gas, and other minerals in the absence of use reverts to the land in a period of ten years".[20]

Article 76 is inapplicable in this case. This case involves an agreement to create a mineral servitude in the future. This 1972 agreement was dependent on Hazel's future ownership of the property. *Hicks* involved an attempt to perpetuate an outstanding mineral servitude on behalf of a previous landowner.

In analogous situations, Louisiana courts have upheld agreements to create mineral servitudes in the future.[21] In *Ober v. Williams*[22] a landowner executed a contract to sell land in the future subject to a mineral servitude reservation. When a dispute arose about the date of the mineral servitude's creation, the Louisiana Supreme Court held that the servitude was created when title was conveyed to the buyer, not when the promise to sell was made. In *Chicago Mill & Lumber Co. v. Ayer Timber Co.*[23] the landowner entered a lease-option contract for a term of five years, during which the landowner retained the right to explore for minerals. After five years, the lessee could exercise its option to purchase the land subject to a mineral servitude in favor of the lessor. The lessee exercised its option and then challenged the validity of the mineral servitude reservation. The court first held that the mineral servitude reservation violated the rule enunciated in *Hicks v. Clark*. But on rehearing[24] the court upheld the contract under the reasoning of *Ober v. Williams*.

The defendant contends that this agreement is different, because in 1972 Hazel Fisher did not own an interest in the

---

[20] *Hicks*, 72 So.2d at 325.

[21] For an excellent discussion of these cases, see La.Rev.Stat.Ann. § 31:28 comment, at 515-18 (West 1975).

[22] 213 La. 568, 35 So.2d 219 (1948).

[23] 131 So.2d 635 (La.Ct.App. 2d Cir.1961).

[24] *Id.* 131 So.2d at 644-52.

Northwest Quarter and Mineral Code article 24[25] allows only a "landowner" to create a mineral servitude. The defendant's argument, however, avoids the issue of when the servitude was created. The defendant assumes that Hazel Fisher created a mineral servitude in 1972, but *Ober v. Williams* and *Chicago Mill & Lumber Co.* make it clear that the date was 1975. In 1972 Hazel agreed to convey her interest in the Northwest Quarter to Franklin Fisher on the condition that Hazel would inherit an interest in that property. When that condition was satisfied in 1975, Hazel created a mineral servitude.[26]

The Louisiana Mineral Code does not address explicitly this situation, but the Mineral Code provides: "If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable".[27] The plaintiffs persuasively argue that Hazel Fisher created a mineral servitude according to the after acquired title doctrine stated in Louisiana Civil Code article 726: "Parties may agree to establish a predial servitude on, or for the benefit of, an estate of which one is not then the owner. If the ownership is acquired, the servitude is established."[28] This mineral reservation did not violate the public policy stated in *Hicks* where a previous landowner claimed an outstanding

---

[25] Except as provided in Article 25, a mineral servitude may be created only by a landowner who owns the right to explore for and produce minerals when the servitude is created." La.Rev.Stat.Ann. § 31:24 (West 1975).

[26] The defendant cites the oversale of minerals situation as the sole exception to the rule of *Hicks*, but this exception is based on the same rationale as *Ober v. Williams* and *Chicago Mill*, See La.Rev.Stat.Ann. § 31:77 (West 1975); *Bates v. Monzingo*, 221 La. 479, 59 So.2d 693 (1952). Professor McDougal describes the oversale exception as follows: "when the landowner who oversold the mineral interests either acquires the outstanding mineral interest or is the landowner when the outstanding interest is extinguished, the title to the servitude will vest in the grantee who *purportedly* acquired it earlier". McDougal, at 1107 (emphasis added). The oversale becomes effective when the seller obtains title, just as Hazel Fisher's mineral servitude reservation became effective when she inherited an interest in the Northwest Quarter. Compare *Ober v. McGinty;*, 66 So2d 385 (La.Ct.App. 2d Cir. 1953), holding that the vendor's reservation of a mineral servitude and an option to extend the servitude is in violation of the rules of prescription.

[27] La.Rev.Stat.Ann. § 31:2 (West 1975).

[28] La.Civ.Code Ann. art. 726 (West 1980).

mineral servitude when it prescribed. Here the servitude's creation was dependent on Hazel's inheritance. The Northwest Quarter was not burdened with a servitude until 1975. The defendant is also estopped to deny the after acquired title doctrine's operation regarding the mineral servitude, because the defendant accepts the benefit of its operation, that is, title to Hazel Fisher's inherited interest in the Northwest Quarter.[29]

III. CONCLUSION

Because the 1968 transaction between Julie Fisher and her children was an absolute nullity, Hazel and Franklin Fisher did not own an interest in the Northwest Quarter until 1975, when Julie Fisher died and her property passed to them by intestacy. Then Hazel Fisher's 1972 agreement to convey her interest in the Northwest Quarter subject to a mineral servitude became effective. The district court's contrary summary judgment and dismissal of the plaintiffs' complaint is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

---

[29] *See, eg., Jackson v. United Gas Public Serv. Co.*, 196 La. 1, 198 So. 633 (1940).

JOSEPH WOODS,
Petitioner-Appellant,
vs.
ROBERT H. BULTER, SR., WARDEN LOUSIANA STATE PENITENTIARY, *et al.*,
Respondents-Appelles.

No. 87-3505
United States Court of Appeals, Fifth Circuit
June 28, 1988.

Defendant convicted of possession of controlled dangerous substance petitioned for writ of habeas corpus. The United States District Court for the eastern District of Louisiana, A.J. McNamara, J., denied petition, and appeal was taken. The Court of Appeals, Johnson, Circuit Judge, held that valid prescription was defense to crime of possession of controlled substance which State could properly require defendant to prove.

Affirmed.

1. Constitutional Law 266(7)
Drugs and Narcotics 43, 78

Valid prescription was defense to crime of possession of controlled substance, rather than lack of valid prescription being an element of such crime, and thus Louisiana statute requiring defendant to prove existence of valid prescription did not unconstitutionally shift burden of proof on element of crime to defendant; defendant was in best position to possess knowledge of facts necessary to prove existence of prescription. U.S.C.A. Const. Amends. 5, 14; LSA-R.S. 40:967, subd. C, 40:990, subd. A.

2. Constitutional Law 268.2(3)
Criminal Law 1077.2(1)

State's refusal to provide habeas corpus petitioner with trial court transcript did not violate petitioner's due process

rights; petition launched prima facie challenge to legal validity of state statute as interpreted and applied by State, and existence of transcript was not necessary to make such challenge. U.S.C.A Const. Amends. 5,14.

David Gruning, New Orleans, La., for petitioner-appellant.

Joseph Woods, pro se.

Jack C. Peebles, William A. Marshall, Asst. Dist. Attys., New Orleans, La., for respondents-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE,* District Judge.

JOHNSON, Circuit Judge.

Petitioner Joseph Woods was convicted by a jury on October 16, 1979, of the crime of possession of a controlled dangerous substance—phenmetrazine. Woods now argues his 1979 conviction is constitutionally infirm as the Louisiana Controlled Dangerous Substances Law, La.Rev.Stat. 40:961 *et seq.*, pursuant to which Woods was convicted, shifts the burden of proof on an element of the charged offense to the accused. Because we conclude that a valid prescription is a defense to the crime of possession of a controlled substance which the State may properly require a defendant [copy to come?]

---

* District Judge of the Eastern District of Louisiana, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

IDA MARIE CUTLER LYONS, *et al*

VS.

FRANKLIN LEE FISHER, *et al*

CIVIL ACTION NUMBER 85-3629

SECTION O - JUDGE SHAW

JUDGMENT

This action came on for hearing before the court, District Judge John M. Shaw presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED AND DECREED that the motion of defendant Franklin Lee Fisher for summary judgment against plaintiffs Ida Marie Cutler Lyons, Catherine Cutler Hurst, and Hazel Pauline Cutler Sawyer is hereby GRANTED, that the action of plaintiffs against defendant, Franklin Lee Fisher, be dismissed, and that defendant recover of the plaintiffs his costs of this action.

Opelousas, Louisiana, October 13, 1987.

JOHN M. SHAW

JOHN M. SHAW
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

IDA MARIE CUTLER LYONS, *et al*

vs.

FRANKLIN LEEFISHER, *et al*

CIVIL ACTION NUMBER 85-3629

SECTION O— JUDGE SHAW

RULING

Now before the court is the motion of defendant Franklin Lee Fisher for summary judgment against plaintiffs Ida Marie Cutler Lyons, Catherine Cutler Hurst and Hazel Pauline Cutler Sawyer. Franklin Fisher argues that he, rather than the plaintiffs, is the owner of an undivided one-half mineral interest in the Northwest Quarter of Section 34, Township 11 South, Range 3 West, Vermilion Parish, Louisiana ("Northwest Quarter").

On November 27, 1985, plaintiffs, each individually and each as Trustees of various trusts for their children, commenced this action, seeking to be declared owners as heirs or transferees of their mother, Hazel Bertha Fisher, of the Northwest Quarter. A certified Judgment of Possession rendered in the Succession of Walter Franklin Fisher on February 23, 1985, reflects that Walter Fisher died intestate, survived by his wife Julie Ida Fisher, and their two children, Hazel Bertha Fisher, who is the mother of plaintiffs, and defendant, Franklin Fisher. Pursuant to that judgment, Julie Ida Fisher was placed in possession of an undivided one-half interest in the Northwest Quarter of Section 34, with the remaining undivided one-half interest received by Hazel Fisher and Franklin Fisher, subject to the usufruct of their mother. By act dated December 20, 1957, those parties partitioned the lands belonging to the succession, with Julie Fisher receiving the Northwest Quarter of Section 34 and

Hazel Fisher and Franklin Fisher each receiving other property. In that partition, it was stipulated that the minerals were held in indivision.

By donation dated May 7, 1968, Julie Fisher donated to Hazel Fisher and Franklin Fisher the Northwest Quarter of Section 34. In this donation, she reserved all of the oil, gas, and minerals in the property. As of May 7, 1968, Julie Fisher was vested by her reservation with a mineral servitude of all oil, gas, and other minerals in and under the Northwest Quarter of Section 34. On May 8, 1968, in a Sale of Usufruct, Hazel Fisher and Franklin Fisher transferred to their mother the usufruct over the Northwest Quarter.

On November 27, 1972, Hazel Fisher transferred to Franklin Lee Fisher, for other lands more fully described herein, a 21.56% interest in and to the Northwest Quarter. In this transfer, Hazel Fisher reserved all "of her undivided interest in and to all of the oil, gas, and minerals. . . on and under the property described [.]" On the same date, Hazel Fisher transferred to Franklin Fisher her remaining 20.44% interest in the Northwest Quarter. Hazel Fisher reserved her undivided mineral interest in the property in this act of sale.

Julie Fisher died January 12, 1975 intestate. There were no mineral operations on the property from May 7, 1968, until May 7, 1978, the end of Julie Fisher's ten-year reservation of minerals. It was not until November, 1978, that production commenced.

The parties dispute the validity of Julie Fisher's 1968 donation of the Northwest Quarter to Hazel and Franklin Fisher. Needless to say, the court finds that whether or not this transaction was valid, Franklin Fisher is the true owner of the mineral servitude on the Northwest Quarter.

Assuming the 1968 donation by Julie Fisher was valid, then the 1972 mineral reservations by Hazel Fisher in the Act of Exchange and Act of Sale are without effect, as at that time all minerals had been reserved by Julie Fisher in the 1968 donation. *See* Louisiana Mineral Code Article 24. Thus, Hazel Fisher's mineral reservations in 1972 did not

create another mineral servitude because Hazel Fisher did not own the minerals in the subject property.

Upon the death of Julie Fisher in 1975, Hazel was vested with an undivided one-half mineral interest in the Northwest Quarter of Section 34. This mineral interest devolved to Hazel Fisher from her mother's ownership by virtue of the reservation in the 1968 donation. Thus, in May, 1978, by virtue of liberative prescription, this mineral servitude, created ten years earlier, prescribed, terminating Hazel Fisher's mineral interest in the subject property. Consequently, all minerals in the subject property vested in Franklin Fisher at that time.

If the court assumes that the sale of the usufruct of May 8, 1968 invalidated the donation of May 7, 1968, then Julie Fisher remained owner of the property in dispute until her death intestate on January 12, 1975. The after-acquired title doctrine would then vest the subject property in Franklin Fisher, subject to a mineral reservation in favor of Hazel Fisher. This mineral reservation, however, expired upon the termination of the servitude, in May, 1978.

The after-acquired title doctrine dictates that if property is sold by a vendee who has no title thereto, but who afterwards acquires title, then the acquisition of title inures to the benefit of the vendee. Hence, any title subsequently acquired by a vendor inures at once to the benefit to his vendee, whose title he is bound to complete. *Guice v. Mason*, 156 La. 201, 100 So. 397 (1924). Clearly, at the time of the 1972 transfer by Hazel Fisher to Franklin Fisher of an undivided one-half interest in the property with full warranty, she did not then create a mineral servitude. Under Mineral Code 24, a mineral servitude may be created only by a landowner who owns the right to explore for and produce minerals when the servitude is created. Thus, in 1972, when Hazel Fisher executed the exchange and credit deed with Franklin Fisher, Hazel did not have the right to create a mineral servitude. Moreover, in 1975, when Julie Fisher died, Hazel Fisher's acquisition of title to her half of the Northwest Quarter inured to the benefit of Franklin Fisher, by virtue of the after-acquired title

doctrine. Hazel Fisher, however, did retain her interest in the mineral servitude until May, 1978, when the mother's mineral servitude expired. Thereafter, Hazel Fisher's mineral interest inured to Franklin Fisher.

Thus, the court concludes that whether or not Julie Fisher's donation of November 11, 1972 was valid, Franklin Fisher is the owner of the undivided one-half mineral interest in the Northwest Quarter. Plaintiffs, however, argue that this conclusion is erroneous because a mistake in fact or law serves to vitiate Hazel Fisher's sale of her property to Franklin Fisher. Plaintiffs argue that Hazel Fisher assumed that she had the right to create a mineral servitude in the disputed property in 1972, and that because of her inability to reserve the servitude at that time, such error vitiated her consent to the transaction.

Plaintiffs' allegations of mistake of fact or law have not been pleaded in the original complaint, and the court has denied plaintiffs the opportunity to amend their complaint to allow this defense. This case is almost two years old and the trial date is less than one month away. Nevertheless, the court will address the merits of plaintiffs' defense.

Plaintiffs' defense is clearly not meritorious. First, the defense is barred by liberative prescription of five years. *See* LSA-C.C. art. 3497; *Marshall v. Wells*, 381 So.2d 551 (La.App. 2d Cir. 1980). Moreover, in an action for the rescission of a partition and warranty of portions, the prescription period would begin to run from the date the transaction was executed. Clearly, five years have elapsed since the 1972 transaction. In addition, even if the court assumes that the defense has not prescribed, the defense nevertheless fails on the merits. Clearly, a party may vitiate a contract if an error of fact or law was the *sole* basis upon which the contact was based. *See* LSA-C.C. art. 1950. In this case, however, the sole motivation for Hazel Fisher to enter into the agreement to sell her land to Franklin Fisher was not so that she could thereby attempt to reserve an interest in a mineral servitude. Rather, Hazel Fisher desired to convey her land to her brother. Whether or not she could have reserved an interest

in a mineral servitude has little, if anything, to do with the sale of her land. Plaintiffs have provided no evidence to the court to prove otherwise. Thus, plaintiff's defense of mistake of fact or law is not meritorious.

Accordingly, the motion of defendant Franklin Lee Fisher for summary judgment against plaintiffs Ida Marie Cutler Lyons, Catherine Cutler Hurst, and Hazel Pauline Cutler Sawyer is hereby GRANTED.

Opelousas, Louisiana, October 13, 1987.

JOHN M. SHAW

JOHN M. SHAW
United States District Judge

APPENDIX E

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. If shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the

trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

NO. 89-1543

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANKLIN LEE FISHER,
Petitioner,

Versus

IDA MARIE CUTLER LYONS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Patrick D. Gallaugher, Jr.*
J. Michael Veron
Scofield, Gerard, Veron, Hoskins & Soileau
1114 Ryan Street
Post Office Drawer 3028
Lake Charles, LA 70602
(318) 433-9436

Attorneys for Respondents
*Counsel of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

32 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does this diversity of citizenship case ultimately turning on unique principles of Louisiana law present "special and important reasons" warranting review by this Court?

2. In a title dispute over mineral property, a motion for summary judgment is filed in which the key issue presented and argued is whether a donation in the mover's chain of title violated Louisiana law and was an absolute nullity. After being extensively briefed and argued before the district court and the court of appeals, the higher court held that the donation violated Louisiana law and was a nullity. On remand, may the mover ignore the appellate decision simply by contradicting his own prior testimony on this issue?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

CASES **Page**

TABLE OF AUTHORITIES (continued)

CASES **Page**

STATUTES

TABLE OF AUTHORITIES (continued)

STATUTES **Page**

STATUTES WHICH CASE INVOLVES

> The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself.

La. Civ. Code art. 1533 (repealed and amended 1974).

> The price of the sale must be certain, that is to say, fixed and determined by the parties.
>
> It ought to consist of a sum of money, otherwise it would be considered as an exchange.
>
> It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.
>
> It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

La. Civ. Code art. 2464

This brief is respectfully submitted by Ida Marie Cutler Lyons and her sisters, the plaintiffs-respondents, in opposition to the petition for writ of certiorari filed by Franklin Lee Fisher.

COUNTERSTATEMENT OF THE CASE

A. *Nature of the Case.*

This is an action for declaratory judgment. 28 U.S.C. § 2201; Fed. R. Civ. P. 57. Federal subject matter jurisdiction is based solely upon diversity of citizenship. 28 U.S.C. § 1332. Louisiana law furnishes the rule of decision. 28 U.S.C. 1652; *Hanna v. Plumer*, 380 U.S. 460 (1965).

The plaintiffs-respondents sued for declaratory judgment recognizing them as owners of an undivided one-half interest in the minerals underlying the Northwest Quarter of Section 34, Township 11 South, Range 3 West, Vermilion Parish, Louisiana (hereinafter "the Northwest Quarter"). Suit was brought against Franklin Lee Fisher, the mineral co-owner of the Northwest Quarter, and Hunt Oil Company, which leased the Northwest Quarter from both the plaintiffs-respondents and the defendant-applicant, Franklin Lee Fisher. Suit was brought after Franklin Fisher and Hunt Oil Company executed an amendment to this mineral lease that recognized Franklin Fisher as the sole owner of the minerals.

B. *The Factual Background.*

This diversity of citizenship case involves a familial dispute over title to mineral property in Vermilion Parish, Louisiana, originally owned by the parties' common ancestor. The plaintiffs-respondents are the children and heirs of Hazel Bertha Fisher, and are suing in their in-

dividual capacities and as trustees for various trusts for their children. (For the sake of clarity, the plaintiffs-respondents will be referred to as the "Fisher Nieces." Franklin Lee Fisher, the defendant-petitioner, will be referred to as "Franklin Fisher.")

Franklin Fisher and Hazel Bertha Fisher were the only children and the sole heirs of Julie Ida Fisher, who owned the Northwest Quarter prior to May, 1968. On May 7, 1968, Julie Ida Fisher executed a donation of the Northwest Quarter to Hazel Bertha Fisher and Franklin Fisher, reserving the minerals. *Lyons v. Fisher*, 888 F.2d 1071, 1072 (5th Cir. 1989) (*reprinted in* Petitioner's Petition for a Writ of Certiorari, app. 3a-5a) [hereinafter cited "*Lyons v. Fisher II,* petitioner's app. 3a-5a"]. The next day, May 8, Hazel and Franklin purportedly "sold" the usufruct[1] of the Northwest Quarter back to Julie Ida Fisher for a recited consideration of "TEN AND NO/100 ($10.00) DOLLARS and other good and valuable considerations and services rendered." *Id.* On November 27, 1972, Hazel Bertha Fisher sold her undivided one-half interest in the Northwest Quarter to Franklin Fisher, reserving the minerals. *Id.* On January 12, 1975, Julie Ida Fisher died intestate, survived only by Hazel and Franklin, who inherited her estate in indivision. *Id.* In November of 1978, mineral operations were conducted on the Northwest Quarter. *Id.*

In August of 1983, the Fisher Nieces and Franklin Fisher jointly leased the Northwest Quarter to Hunt Oil Company for mineral exploration. A producing well was

---

1. Under Louisiana law, a "usufruct" is the right to possess, use, and enjoy the property and the right to receive the fruits produced by the property. *Clarke v. Brecheen*, 387 So. 2d 1297, 1301 (La. App. 1st Cir. 1980); La. Civ. Code arts. 535-629.

completed. Shortly thereafter, in March of 1985, Franklin Fisher and Hunt Oil Company privately negotiated, and then publicly recorded, an amendment to the 1983 lease. This amendment recognized Franklin Fisher as the *sole* owner of the minerals underlying the Northwest Quarter. *Id.* Hunt Oil Company thereafter ceased paying royalties to the Fisher Nieces. Half of the royalties is being paid to Franklin Fisher, while the other half is being withheld pending the outcome of this suit.

The Fisher Nieces have *not* sued to annul Hunt Oil Company's lease, as Franklin Fisher states. They have sued to annul the *amendment* to that lease recognizing Franklin Fisher as sole owner of the minerals. The Fisher Nieces are parties to Hunt's lease, and the last thing they want is to annul it. Hunt has leased this property from *both* parties, and is therefore unaffected by the outcome of this suit. The gravamen of the suit is whether Franklin Fisher owns *all* of the minerals underlying the Northwest Quarter, or whether the plaintiffs-respondents, his three nieces, own one-half of the minerals, and are entitled to one-half of the lease royalties.

C. *Course of Proceedings and Disposition in Courts Below.*

The ultimate issue in this case was which party had title to the disputed one-half mineral interest. Because of a statute of limitations peculiar to Louisiana mineral law, this issue turned on whether the 1968 donation of the Northwest Quarter referred to above is valid. If it is not, the Fisher Nieces' title prevails.[2]

---

2. The Fisher Nieces and Franklin Fisher both claim ownership of the disputed property from Julie Ida Fisher, their common ancestor. They disagreed, however, as to whether this property passed from this

The Fisher Nieces take considerable exception to Franklin Fisher's description of the proceedings below. His

---

Footnote 2 continued.

ancestor by donation or inheritance. Whether title passed by way of the 1968 donation or through inheritance in 1975 was critical because of a statute of limitations applying to mineral property under Louisiana law.

Unlike the other states, Louisiana has a "nonownership" theory of mineral property. When mineral rights are conveyed to someone other than the fee owner, this does not create a separate mineral "estate." Rather, the conveyance establishes a "mineral servitude"—a type of easement granting the right to explore for minerals on the property and to reduce them to possession. La. Rev. Stat. § 31:21. This servitude is extinguished after ten years by a statute of limitations called the "prescription of nonuse." *Id.* The running of this prescription period, however, is interrupted by drilling operations or production of minerals on the property. *Id.* § 31:29. When the mineral servitude prescribes, the mineral rights revert to the current fee owner.

Mineral operations sufficient to interrupt the running of the prescription of nonuse did not occur on the Northwest Quarter until November of 1978. *Lyons v. Fisher II,* petitioner's app. 4a. This is several months beyond the ten-year anniversary of the attempted donation of the Northwest Quarter. *Id.* The 1968 donation contains a mineral reservation. If the donation is valid, this mineral reservation would have created a mineral servitude. Although this servitude eventually would have been inherited by the Fisher Nieces, it would have terminated under Louisiana's ten-year prescription of nonuse.

This is precisely the theory Franklin Fisher seized upon in claiming his nieces' mineral interest. In 1978, he contended, he was the fee owner of the Northwest Quarter, and termination of the servitude at that time would give him the mineral rights.

The Fisher Nieces, however, contended that the 1968 donation is invalid. In such a case, Julie Ida Fisher would have continued to own the Northwest Quarter until her death in 1975. At her death, her heirs, Hazel Bertha Fisher and Franklin Fisher, inherited her estate in undivided ownership—including undivided ownership of the Northwest Quarter. La. Civ. Code art. 888. Prior to this, in November, 1972, Hazel Fisher sold an undivided one-half interest in the Northwest Quarter to Franklin Fisher, *but reserved the minerals.* This sale, although ineffec-

claim that the validity of the 1968 donation was "pretermitted" and "not at issue" when he moved for summary judgment is simply incorrect. To the contrary, the validity of the donation was a *key issue presented when Fisher moved for summary judgment. See infra,* pp. 13-15.

After removing this suit to the United States District Court for the Western District of Louisiana, Franklin Fisher moved for summary judgment, claiming to be the sole owner of the minerals underlying the Northwest Quarter. Original Record 120-129; *Lyons v. Fisher II,* petitioner's app. 4a-5a. In support of his motion for summary judgment, Franklin Fisher introduced the 1968 donation into evidence, pleaded its validity, and claimed to have acquired ownership of the disputed mineral interest through this donation. Original Record 130-132, 138-143; *Lyons v. Fisher II,* petitioner's app. 7a. In opposing his motion, the Fisher Nieces attacked the validity of the 1968 donation, arguing that it violated Louisiana Civil Code article 1533. Original Record 186-196; *Lyons v. Fisher II,* petitioner's app. 7a. That statute (repealed in 1974, but not retroactively) prohibited an owner of immovable (real) property from donating the property and reserving the usufruct of the property. The Fisher Nieces contended the 1968 donation violated this statute because, as part of the transaction

---

Footnote 2 continued.

tive at the time because Hazel did not yet actually own any interest in the Northwest Quarter, became effective, under the after-acquired title doctrine, in 1975 when she inherited a one-half interest in the Northwest Quarter. *See, Lyons v. Fisher,* 847 F.2d 1158, 1161-62 (5th Cir. 1988)(*reprinted in* Petitioner's Petition for a Writ of Certiorari, app. 7c-10c) [hereinafter cited "*Lyons v. Fisher I,* petitioner's app. 7c-10c."]. At that time, under the after-acquired title doctrine, Franklin Fisher was vested with what was sold to him by Hazel, her *surface* ownership of the Northwest Quarter. But the mineral reservation in Hazel's 1972 sale created a mineral servitude on the after-acquired property, under Louisiana Civil Code article 726. This servitude was created in 1975, well

the donors sold the usufruct of the donated property back to the donor. This so-called "sale" of the usufruct was a sham, they claimed, because the donor had not bought the usufruct for its true worth. In support of this argument, the Fisher Nieces pointed to the language of the donation/usufruct sale itself, and introduced into evidence Fisher's deposition testimony in which he (when questioned about the usufruct sale) basically conceded the usufruct transaction was a gift back or reservation, and not a true sale. Original Record 230-242, 438-541. *Lyons v. Fisher II,* petitioner's app. 7a.

In response to this challenge, Franklin Fisher argued that the consideration recited in the sale instrument was adequate under Louisiana law to support a "sale" of the usufruct. He vigouously contended the donation was valid. *Lyons v. Fisher II,* petitioner's app. 7a. Both parties briefed and argued the validity of the 1968 donation.

The district court granted Franklin Fisher's motion for summary judgment, holding that Franklin Fisher owned the disputed mineral interest. Ruling, *Lyons v. Fisher,* No. 85-3629 (Oct. 13, 1987); *Lyons v. Fisher II,* petitioner's app. 4a-5a. The Fisher Nieces appealed that ruling on the grounds that the 1968 donation—an essential link in Fisher's chain of title—violated Civil Code article 1533 and was a nullity. *See Lyons v. Fisher,* 847 F.2d 1158, 1158 (5th

---

Footnote 2 continued.

within the ten-year prescription period prior to the 1978 drilling activities. The Fisher Nieces inherited this servitude from their mother and therefore own the one-half mineral interest disputed in this suit.

In short, if the 1968 donation was invalid, the Fisher Nieces own this interest, and should be receiving one-half of the royalties (with Franklin Fisher receiving the other half).

Cir. 1988) (*reprinted in* Petitioner's Petition for Writ of Certiorari app. 1c-10c") [hereinafter cited "*Lyons v. Fisher I,* petitioner's app. 1c-10c"] The validity of the donation was again briefed and argued by both parties. *Lyons v. Fisher I,* petitioner's app. 2c. The United States Court of Appeals for the Fifth Circuit reversed the district court, specifically holding that the 1968 donation violated article 1533 and was null, and remanded the case "for further proceedings consistent with this court's opinion." *Lyons v. Fisher I,* petitioner's app. 1c-10c.

On remand, Franklin Fisher sought to redetermine the validity of the 1968 donation. The district court ruled that the validity of the 1968 donation was the law of the case. Ruling, *Lyons v. Fisher,* No. 85-3629 (W.D. La. Dec. 16, 1988) (Petitioner's Petition for Writ of Certiorari app. 1b-3b). There being no other contested issue in this case, summary judgment was granted in favor of the Fisher Nieces. *Id.* Franklin Fisher appealed, and the court of appeals unanimously affirmed the trial court's decision. *Lyons v. Fisher II,* petitioner's app. 1a-11a. Franklin Fisher now seeks writ of certiorari to review that decision.

SUMMARY OF ARGUMENT

1.

This diversity of citizenship case ultimately turns on an interpretation of Louisiana Civil Code article 1533, a statute repealed in 1974, and the application of unique principles of Louisiana donations, sales, and successions law. It affects no interest beyond the private apportionment of mineral royalties among these family members. It presents no "special and important reasons" warranting review by this Court.

2.

The courts below correctly applied the law-of-the-case doctrine. The petitioner's claim that this doctrine was misapplied is based on an incorrect description of the proceedings below. The decisions below are in accord with decisions of this Court and the circuit courts of appeals.

REASONS FOR DENYING THE WRIT

1. *This diversity of citizenship case ultimately turns on application of a now repealed Louisiana statute; it presents no "special and important reasons" warranting review by this Court.*

A petition for writ of certiorari is appropriate only where some compelling *public* interest is at stake. This Court does not sit to adjudicate issues of interest solely to the particular litigants. "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1954). "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *National Labor Relations Board v. Pittsburgh Steamship Co.,* 340 U.S. 498, 502 (1951) (*citing Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1922)); Sup. Ct. R. 10; *See also Rice v. Sioux City Memorial Park Cemetery, supra,* 349 U.S. at 79.

No such public principles are at stake in this case. This suit is a title contest that was removed to federal court solely on the basis of diversity of citizenship between the parties. It involves no federal or constitutional questions. It presents no "special and important reasons" warranting consideration by this Court. This case affects no interest other than the private apportionment of mineral royalties among these family members. The resolution of this case ultimately turns upon the application of unique principles of Louisiana donations, sales, and property law.

In *Lyons v. Fisher I,* petitioner's app. 1c-10c, the 1968 donation on which Franklin Fisher bases his claim to his nieces' mineral interest was unanimously held invalid by three federal judges sitting in Louisiana and having familiarity with that State's law. The opinion was authored by Circuit Judge John Minor Wisdom, who practiced law in Louisiana and who is an authority in Louisiana property and donations law. (*See, e.g.,* 60 Tul. L. Rev., vol. 2 (1985)).

The 1968 donation was held invalid because it violated Louisiana Civil Code article 1533. This statute was repealed nonretroactively in 1974, and therefore has no prospective interest to the public—even in Louisiana.

Louisiana Civil Code article 1533 prohibited the owner of immovable (real) property from donating that property while reserving the usufruct of the property. La. Civ. Code art. 1533 (repealed and amended 1974); *Lyons v. Fisher I,* petitioner's app. 4c-7c. Under Louisiana law, a usufruct of property includes most of the rights and prerogatives of ownership; it is the right to use, possess, and enjoy the property, and to receive the fruits of the property, until the death of the unsufructuary. *Id.*, petitioner's app. 3c n.2; La. Civ. Code arts. 550-569. The usufruct of a 160-acre farm would include the right to keep the proceeds

of the sale of crops, La. Civ. Code arts. 550-551, the proceeds of timberland management, *Id.*, art. 562, and the products of farm animals, *Id.*, art. 561, in addition to the right to live on the land and use it.

Prior to its repeal, Civil Code article 1533 provided: "The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself." *See Lyons v. Fisher I,* petitioner's app. 5c. Under this statute, any donation of real property containing a direct *or indirect* reservation of the usufruct was absolutely null, and would be given no legal effect or reality. Such donations were considered a serious threat to Louisiana public policy because they would allow owners to donate property at death (*i.e.,* reserve the right to use the property during life) without following the Louisiana laws pertaining to successions and wills, possibly circumventing death taxes and Louisiana's forced heirship law. *Lyons v. Fisher I,* petitioner's app. 5c, n.7; *accord, Clarke v. Brecheen,* 387 So. 2d 1297, 1300 (La. App. 1st Cir.), *writ denied,* 394 So. 2d 606 & 607 (La. 1980), *appeal after remand,* 415 So. 2d 550 (La. App. 1st Cir. 1982); *Succession of Simpson,* 311 So. 2d 67 (La. App. 2d Cir.), *writ denied,* 313 So. 2d 839 (La. 1975); *Estate of Richard v. Richard,* 321 So. 2d 375 (La. app. 3d. Cir. 1975); *Whitten v. Whitten,* 303 So. 2d 328 (La. App. 2d Cir. 1974); *Crain v. Crain,* 175 So. 2d 665 (La. App. 1st Cir. 1965); *Succession of Delauney,* 138 So. 2d 41 (La. App. 1st Cir. 1962).

One day after Julie Ida Fisher donated the Northwest Quarter—a 160-acre farm—to Hazel and Franklin, Hazel and Franklin purported to "sell" the usufruct of the Northwest Quarter back to the donor for "TEN AND NO/100 ($10.00) DOLLARS and other good and valuable consideration." *Lyons v. Fisher II,* peti-

tioner's app. 4a. By these virtually simultaneous transactions, Julie Ida Fisher attempted to circumvent article 1533 by donating property to her children, who immediately thereafter "sold" the unsufruct to her.

In *Lyons v. Fisher I,* petitioner's app. 4c-7c, the appellate court ruled that by donating the Northwest Quarter to her children and, at the same time, having the children reconvey the usufruct of the property, Julie Ida Fisher violated Civil Code article 1533. In so ruling, the court noted the timing of the donation and usufruct sale (they were one day apart), and the overall effect of the transactions (it was precisely what article 1533 forbade). The court also noted the usufruct sale recited only nominal consideration. Under Louisiana law, neither the ten dollars recited in the sale agreement (signed by Franklin Fisher) nor the $450 Fisher now claims was paid is sufficient consideration to support the "sale" of the lifetime usufruct of a 160-acre farm. La. Civ. Code art. 2464(4); *Lyons v. Fisher I,* petitioner's app. 5c-6c. Louisiana's civil law is entirely different from the common law in regard to what is sufficient consideration to support a true "sale" of real property. While the slightest consideration may be sufficient to support the sale of such property under the common law, under Louisiana law consideration must be proportionate to the value of what is sold, or the so-called sale is considered, in actuality, a donation. La. Civ. Code art. 2464(4); *See, e.g., Murray v. Barnhart,* 117 La. 1023, 42 So. 489, 492 (1906). Merely boilerplating the sale with the words "and other good and valuable consideration" does not suffice to show serious consideration because, under Louisiana law, consideration must be "certain, that is to say, fixed and determined by the parties," at the time of the sale. La. Civ. Code art. 2464; *Lyons v. Fisher I,* petitioner's app. 6c n.13; *Conway v. Bordier,* 6 La. 346 (1834).

The usufruct transaction was therefore a gift or reservation, not actually a "sale," and this was reflected not only on the face of the transaction but by Franklin Fisher's deposition testimony that had been put into evidence. *Lyons v. Fisher II,* petitioner's app. 7a. This supported—but was not the sole grounds for—the court's conclusion that this simultaneous donation/usufruct sale violated Civil Code article 1533.

This case, therefore, ultimately turns on unique principles of Louisiana sales, donations, and property law. More particularly, the case turns on the interpretation and application of Louisiana Civil Code article 1533. That article was repealed in 1974, and is no longer of prospective interest—even in Louisiana. To repeat, this case is a Louisiana mineral title dispute that was removed to federal court solely on the basis of diversity of citizenship jurisdiction. It involves no federal or constitutional questions, and involves no public interest justifying consideration by this Court. This case affects no interest beyond the private apportionment of mineral royalties between an uncle and his three nieces.

2. *The court below correctly applied the law-of-the-case doctrine in accordance with the decisions of this Court and the circuit courts of appeals. Franklin Fisher's claim that this doctrine was misapplied is founded on an incorrect statement of the proceedings below.*

Franklin Fisher argues the law-of-the-case doctrine should not have been applied in this case. To the contrary, if there ever was a case warranting the application of that doctrine, it is this one.

To begin with, Franklin Fisher's argument rests upon an inaccurate statement of the proceedings below. He repeatedly asserts that when he moved for summary judgment the validity of the 1968 donation was not at issue. The court of appeals, he claims, for no apparent reason took up this issue *sua sponte* and decided it.

Even a cursory reading of the decisions below will show that this is simply incorrect.

Franklin Fisher's motion for summary judgment was based squarely on the claim that he owned the disputed mineral interest. When Franklin Fisher moved for summary judgment, he put a certified copy of the 1968 donation into evidence, and affirmatively pleaded its validity as part of his title to the property. *Lyons v. Fisher II,* petitioner's app. 7a. He filed an affidavit asserting the validity of this donation/usufruct sale as part of his title to the disputed interest.

In opposing his motion, the Fisher Nieces attacked the validity of the 1968 donation. *Id.* The Fisher Nieces contended the donation violated article 1533 because the donees simultaneously sold the usufruct back to their mother, the donor. The Fisher Nieces further argued that the so-called "sale" of the usufruct was a sham because the donor did not in fact buy the usufruct for its true worth. In support of this, the Fisher Nieces pointed to the "ten dollars" recited in the sale instrument, and also introduced Franklin Fisher's deposition testimony into evidence—testimony in which, when asked what consideration was paid for the usufruct, Fisher mentioned no consideration whatsover other than the $10 recited in the sale, and characterized the usufruct transaction as a gift or reservation, not a sale. *Id.*

In response, Franklin Fisher argued that the usufruct was not technically "reserved" in violation of article 1533, but was "sold" to the donor. He argued that the consideration recited in the usufruct sale was sufficient to support a sale under Louisiana law. *Id.* The validity of the 1968 donation was briefed in detail by each party, and was argued at the oral argument. In granting summary judgment to Franklin Fisher, the district court expressly noted that "[t]he parties dispute the validity of Julie Fisher's 1968 donation of the Northwest Quarter." Ruling, *Lyons v. Fisher* No. 85-3629 (W.D. La. Oct. 13, 1987) (reprinted in Petitioner's Petition for Writ of Certiorari, app. 3d).

After summary judgment was granted in favor of Franklin Fisher, the Fisher Nieces appealed the case *on grounds that the 1968 donation was invalid because it violated Civil Code article 1533. See Lyons v. Fisher I,* petitioner's app. 2c. "[O]n appeal this issue was squarely briefed and argued before the prior panel." *Lyons v. Fisher II,* petitioner's app. 7a. *See Lyons v. Fisher I,* petitioner's app. 4c-7c.

Thus, this issue was raised and briefed a number of times by each party prior to the first appellate ruling. Franklin Fisher was *deposed* on this issue. This issue was not whisked out of thin air, or created *ex nihilo* by the appellate court, as Franklin Fisher suggests.

After the court of appeals ruled that the 1968 donation violated article 1533, and the case was remanded, Franklin Fisher attempted an end run around the decision by confecting an affidavit claiming to have suddenly "recalled" receiving a $450 payment for the usufruct, rather than the $10 recited in the sale instrument. This was the first time in this three-and-one-half-year-old case that

he claimed to have received such a payment. Furthermore, this claim is inconsistent with his deposition testimony. On the basis of this affidavit, he asked the district court to declare the 1968 donation valid, in direct contravention of the court of appeals mandate on the validity of the 1968 donation.

> The law-of-the-case doctrine
>
> > precludes re-examination of issues of law or fact decided on appeal, either by the district court on remand or by the appellate court itself on a subsequent appeal. This doctrine "is based on the salutary and sound public policy that litigation should come to an end." *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). Indeed, if every question once considered and decided remained open for re-examination in subsequent proceedings in that same case, an appellate court could not effectively or satisfactorily perform its duties. Moreover, the law-of-the-case doctrine "discourages 'panel shopping' at the circuit level for in today's climate it is most likely that a different panel will hear subsequent appeals." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 662 (5th Cir. 1974), *cert. den.*, 420 U.S. 929, 95 S. Ct. 1128, 43 L.Ed. 2d 400 (1974).

Todd Shipyards Corp. v. Auto Transp., S.A., 763 F.2d 745, 750 (5th Cir.), *reh'g denied*, 770 F.2d 164 (5th Cir. 1985).

The application of the law-of-the-case doctrine by the courts below is consistent with that doctrine as applied by this Court, *United States v. Camou*, 184 U.S. 572, 574 (1901), as well as the circuit courts of appeals. *E.g., Smith International, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579-80 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 827 (1985), *on remand*, 839 F.2d 663 (Fed. Cir. 1988); *Waggoner v.*

Dallaire, 767 F.2d 589, 593 (9th Cir 1985), *cert. denied*, 475 U.S. 1064 (1986); *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984), *reh'g denied*, 747 F.2d 710 (11th Cir. 1984); *Baumer v. United States*, 685 F.2d 1318 (11th Cir. 1982); *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674 (10th Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972), *appeal after remand*, 490 F.2d 521 (10th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); *Paull v. Archer-Daniels-Midland Co.*, 313 F.2d 612 (8th Cir. 1963).

The law-of-the-case doctrine serves a number of crucial functions. It "promotes judicial efficiency by serving the purpose of insuring that litigation on an issue will come to an end, discouraging 'panel shopping' at the circuit level, and assuring the obedience of lower courts to the decisions of appellate courts." *Westbrook v. Zant, supra*, 743 F.2d at 768.

Franklin Fisher claims the law-of-the-case doctrine was "grossly misapplied" by the courts below because, after the 1968 donation's validity was ruled upon by the court of appeals (after being extensively briefed and argued several times by the parties, before both the district court and the court of appeals), he was not permitted to ignore that ruling on remand simply by renouncing and supplementing parts of his evidence. But to allow litigants to do that would be to abolish the doctrine.

All federal circuit courts of appeals, including the Fifth Circuit, recognize an exception to the law-of-the-case doctrine where "substantially different evidence" is presented on remand. *See Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1005 (5th Cir.), *reh'g denied*, 693 F.2d 133 (5th Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983), *reh'g denied*, 641 U.S. 924 (1983). It is also well-recognized, however, that the "substantially different evidence" excep-

tion does not apply when the issue decided on appeal is not left open for the taking of new evidence. *United States v. Camou, supra,* 184 U.S. at 574; *Goodpasture, Inc. v. M/V Pollux, supra,* 688 F.2d at 1006 n.5; *National Airlines, Inc. v. International Assoc. of M.&A.W.,* 430 F.2d 957, 960 (5th Cir. 1970), *aff'd after remand,* 478 F.2d 1062 (5th Cir. 1973), *cert. denied,* 400 U.S. 992 (1973); *Paull v. Archer-Daniels-Midland Co., supra,* 313 F.2d at 617. If the law of the case could be ignored simply by confecting an affidavit supplementing, renouncing, or changing one's record "evidence" pertaining to the decided issue, any ruling by a court of appeals or by this Court could simply be ignored on remand. *See Paull v. Archer-Daniels-Midland Co., supra,* 313 F.2d at 616. As here, a disgruntled party wanting another "at bat" only would need to read the court of appeals' decision, then fashion an affidavit addressing the concerns discussed by the court of appeals. *See Drachenberg v. Canal Barge Co., Inc.,* 612 F.2d 760 (5th Cir.), *reh'g denied,* 626 F.2d 172 (5th Cir. 1980). "[T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." *United States v. Camou, supra,* 184 U.S. at 574.

Franklin Fisher argues that, because he moved for summary judgment, he had "no obligation" to adduce evidence on the key, controverted issue of the validity of the 1968 donation. He was within his rights, he suggests, to withhold such evidence while the parties briefed and argued the issue, and until after the courts ruled on the issue, then to use that evidence to try to undermine the courts' rulings. But a motion for summary judgment is not simply a "free shot" at an opponent. *See* Fed. R. Civ. P. 56(d). Nor is a party moving for summary judgment entitled to withhold evidence on key issues directly raised by the

motion. In a motion for summary judgment, "it is the duty of the party litigants to fully disclose all evidence which sheds any light in explanation of the allegations which appear in the pleadings." *Bowels v. Ward*, 65 F. Supp. 880, 889 (W.D. Pa. 1946); *accord, Carr v. Goodyear Tire & Rubber Co.*, 64 F. Supp. 40, 50-51 (S.D. Cal. 1945). Under Fed. R. Civ. P. 56(d), some litigants moving for summary judgment have had summary judgment rendered *against* them because they failed to contradict evidence on a dispositive issue raised by their opponents. *See, e.g., Siderius, Inc. v. M.V. Ida Prima*, 613 F.Supp. 916, 923 (S.D.N.Y. 1985); *Procter & Gamble Ind. U. v. Procter & Gamble Mfg. Co.*, 312 F.2d 181, 190 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963); *Local 33, Int. Hod Carriers, etc. v. Mason Tenders, etc.*, 291 F.2d 496, 505 (2d Cir. 1961).

Franklin Fisher's claim he actually received $450 for the usufruct does not square with either the sale instrument or his earlier deposition testimony. The sale instrument (signed by Fisher) is a sworn, notarial act, and if his deposition answers were incorrect or inaccurate, he failed to set the record straight as required by Fed. R. Civ. P. 26(e)(2) ("A party is under a duty seasonably to amend a prior [discovery] response if . . . the party knows that the response was incorrect when made"). If he had such evidence he had every "reason and incentive" to reveal this evidence at his deposition when questioned specifically on this issue, and to reveal it when this issue became the central disputed issue on his motion for summary judgment. For him to now assert that he never had an "opportunity" or "reason" to present this evidence is simply wrong.

And he cannot fault the court of appeals for deciding an issue it was specifically called upon to resolve. *See Lyons v. Fisher I*, petitioner's app. 2c.

Franklin Fisher next claims the decision below conflicts with this Court's holding in *United States v. United States Gypsum Co.*, 240 U.S. 76 (1950). In *United States Gypsum Company*, after the plaintiff presented evidence at trial, the plaintiff's suit was involuntarily dismissed for failure to state a claim for relief, under Fed. R. Civ. P. 41(b). This Court reversed that dismissal, holding that the plaintiff's evidence stated a "prima facie" case against the defendant. On remand, the defendant presented evidence countering the plaintiff's claims, but the lower court granted summary judgment in favor of the plaintiff. When the case was later appealed again to the United States Supreme Court, this Court affirmed the summary judgment, but acknowledged that its earlier ruling did not preclude the defendant from introducing evidence on remand. Franklin Fisher argues that this holding means that summary judgment may *never* be granted on the basis of the law of the case so long as the opposing party's attorney can think of some new twist of evidence to argue.

But *United States Gypsum Company* does not hold this at all.

Whether an issue has been ruled upon so as to become the law of the case depends upon the *mandate* of the higher court. The court's mandate is its instructions to the lower court. In *United States Gypsum Company*, this Court simply ruled that the evidence presented by the plaintiff constituted a "prima facie case," which means a case "such as will prevail until contradicted and overcome by other evidence." BLACK'S LAW DICTIONARY 1071 (5th Ed. 1979). Such a ruling in no way prohibits a defendant from putting on evidence — — it *invites* the defendant to do so.

In reversing the summary judgment granted in favor of Franklin Fisher, however, the court of appeals did not state that the plaintiffs had made out a "prima facie case." It very clearly and unequivocally ruled that the 1968 donation was an absolute nullity, and remanded the case for further proceedings consistent with that decision. *Lyons v. Fisher I,* petitioner's app. 6c-7c; *Lyons v. Fisher II,* petitioner's app. 6a-7a. The *mandate* in *Lyons v. Fisher I* was a completely different one than that of *United States Gypsum Company.*

Franklin Fisher next suggests that the decisions below conflict with *Pubali Bank v. City National Bank,* 777 F.2d 1340 (9th Cir. 1985) and *United States v. Robinson,* 690 F.2d 869 (11th Cir. 1982).

Pubali Bank is similar to *United States Gypsum Company,* and is distinguishable from the present case for the same reason. Just as in *United States Gypsum Company,* the *Pubali Bank* court of appeals first ruled that the plaintiff had made out a "prima facie case" against the defendants, stating: "Solely on the basis of the case made out by [the plaintiff] in chief, [the defendants] would be jointly liable to [the plaintiff] for its losses . . . If [the defendants] had rested at that point, [the plaintiff] would have been entitled to the restoration of the funds drawn against it." *Pubali Bank v. City National Bank,* 676 F.2d 1326, 1330 (9th Cir. 1982).

When the case was remanded, summary judgment was granted in the plaintiff's favor on the basis of the appellate decision. On the second appeal, the appellate court held summary judgment should not have been granted on the basis of the first appellate decision.

Once again, that ruling follows rather obviously from the *mandate* in that case. If a court of appeals merely states that a plaintiff has made out a "prima facie" case, this is not a final ruling on the issue. In the present case, the court of appeals *ruled that the 1968 donation was an absolute nullity,* and remanded for further proceedings consistent with that decision. This is an entirely different mandate than the one rendered in *Pubali Bank.*

United States v. Robinson, 690 F.2d 869 (11th Cir. 1982) was an appeal of a conviction of the defendant for drug trafficking. The issue was whether the defendant had been coerced into accompanying the arresting officer into a private office where the defendant consented to a search.

United States v. Robinson is an anomaly. An honest comparison of this case with its earlier appeal, *United States v. Robinson,* 625 F.2d 1211 (5th Cir. 1980), will reveal that it is merely a rare instance in which a court of appeals recognized that its earlier ruling was based upon a complete misreading of the record — — a factual assumption that simply was not in the record. In the case *sub judice,* the court of appeals had the opportunity to review the prior panel's ruling and concluded it was squarely based on a correct appraisal of the record evidence.

Neither of these cases, therefore, fits the facts of this case.

CONCLUSION

This diversity of citizenship case ultimately turns on issues of Louisiana donations, sales, and successions law. The key statute on which the case revolves, Louisiana Civil Code article 1533, was repealed in 1974 and is no longer of prospective interest, even in Louisiana. This case involves no federal or constitutional questions, and has no compelling interest to the public at large. It simply concerns the private apportionment of mineral revenues among family members. Furthemore, the decisions below are in full accord with Louisiana law and the law-of-the-case doctrine as applied in other circuits and by this Court.

For these reasons, the petition should be denied.

Respectfully submitted,

PATRICK D. GALLAUGHER, JR.*
J. MICHAEL VERON
SCOFIELD, GERARD, VERON,
HOSKINS & SOILEAU
1114 Ryan Street
Post Office Drawer 3028
Lake Charles, LA 70602
(318) 433-9436

Attorneys for Respondents
*Counsel of Record

CERTIFICATE OF SERVICE

I, Patrick D. Gallaugher, Jr., a member of the Bar of this Court, hereby certify that, as counsel for the plaintiffs-respondents, I received a copy of the Petition for Writ of Certiorari on April 2, 1990, and that three copies of the Respondents' Brief in Opposition to the Petition for Writ of Certiorari were mailed, first class postage prepaid, to Harry A. Rosenberg, counsel for the petitioner. I further certify that all parties required to be served have been served.

PATRICK D. GALLAUGHER, JR.
SCOFIELD, GERARD, VERON,
HOSKINS & SOILEAU
1114 Ryan Street
Post Office Drawer 3028
Lake Charles, LA 70602
(318) 433-9436

Attorneys for Respondents